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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

vs.

COREY RAMONE FRAZIER,

Respondent.

On Petition For Writ Of Certiorari
To The Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the federal district court conditionally granted respondent's petition for *habeas corpus* on its finding that the Michigan Court of Appeals' application of the *Strickland v. Washington*, 466 U.S. 668 (1984) ineffective assistance of counsel standard, instead of *Cronic v. United States*, 466 U.S. 648 (1984) standard, was an unreasonable application of established federal law, but where the Michigan Supreme Court on the prosecutor's interlocutory appeal subsequently ruled that the federal court opinion is constitutionally infirm and vacated the same, and the Michigan Supreme Court variously denied the prosecutor's request to reinstate respondent's convictions and sentences for felony murder and related crimes, on grounds of forfeiture, *res judicata*, or because a decision of reinstatement would cause unnecessary confusion and uncertainty, should the United States Supreme Court grant *certiorari* and decide the important question of the *res judicata* effect of a federal court constitutionally infirm determination that a confession used to obtain a state court conviction was improperly admitted because respondent was not effectively represented by defense counsel.

2. Whether this Court should grant *certiorari* to clarify the applicability of the law of the case doctrine and *res judicata* to *habeas corpus* decisions on return of criminal cases to state court for further proceedings where there is no recent United States Supreme Court jurisprudence in this regard and there appears to be a split of opinion within the United States Courts of Appeals and State Courts.

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PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

Now come the People of Michigan, Petitioner, by David S. Leyton, Prosecuting Attorney in and for the County of Genesee, Michigan, and Donald A. Kuebler, Chief Appellate Counsel, praying that a *writ of certiorari* will issue to review the published decision of the Michigan Supreme Court released for publication June 6, 2007 in *People v. Frazier*, 478 Mich. 231 (2007), *rehearing denied*, July 16, 2007, 478 Mich. 1201, reversing in part, the Michigan Court of Appeals decision in *People v. Frazier*, 270 Mich. App. 172 (2006) that the exclusionary rule applies to certain street sweepers' testimony whose identity was learned from defendant's confession, and vacating the Michigan Court of Appeals' endorsement of the federal district court's *habeas corpus* analysis in *Frazier v. Berghuis*, 02-CV-71741-DT (Aug. 6, 2003), 2003 WL 25195212 [Appendix 2a, 3a, 6a, 9a-17a] holding that the Michigan Court of Appeals application of *Strickland v. Washington*, 466 U.S. 668 (1984) ineffective assistance of counsel standard to this case rather than the *United States v. Cronic*, 466 U.S. 648 (1984) analysis, was an unreasonable application of clearly established federal law, but denying the prosecutor's request to reinstate respondent's convictions and sentences on grounds of forfeiture or *res judicata*, or because a decision of reinstatement would cause unnecessary confusion and uncertainty, notwithstanding its decision that the federal court *habeas* decision is constitutionally infirm.

CITATIONS TO OPINIONS BELOW

The decision of the Michigan Supreme Court was released for publication June 6, 2007, and is reported as *People v. Frazier,* 478 Mich. App. 231 (2007), *rehearing denied*, July 16, 2007, 478 Mich. 1201. The opinion reversed in part, the Michigan Court of Appeals decision in *People v. Frazier*, 270 Mich. App. 172 (2006), holding that the exclusionary rule applies to certain street sweepers' testimony whose identity was learned from respondent's confession and vacated the Court of Appeals' endorsement of the federal district court's *habeas corpus* analysis in *Frazier v. Berghuis*, 02-CV-71741-DT (Aug. 6, 2003) 2003 WL 25195212 [Appendix 9a-17a] holding that the Michigan Court of Appeals' application of the *Strickland v. Washington*, 466 U.S. 668 (1984) ineffective assistance of counsel standard to this case rather than the *United States v. Cronic*, 466 U.S. 648 (1984) analysis was an unreasonable application of clearly established federal law, but denying the prosecutor's request to reinstate defendant's felony murder and related convictions and sentences on grounds of forfeiture or *res judicata*, or because a decision of reinstatement would cause unnecessary confusion and uncertainty, notwithstanding its decision that the federal court *habeas* decision is constitutionally infirm. [Copies of the opinions below and the referenced order denying Petitioner's request rehearing in the Michigan Supreme Court are included in the appendix to this petition, *infra*, Appendix. 1a-151a]

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. section 1257(a). The portion of the Michigan Supreme Court opinion pertinent to the issues presented rests upon the Federal Constitution and relies on federal law, discussing and citing federal cases almost exclusively. *Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronic*, 466 U.S. 657 (1984); *Collins v. Loisel*, 262 U.S. 426, 430 (1923); *Gentry v. Dueth*, 456 F.3d 687 CA 6 2006).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The constitutional provision involved in this petition is Constitution of the United States, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C.A. section 2254 provides:

(d) An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

CONCISE STATEMENT OF THE CASE

The Michigan Supreme Court decision was entered and released for publication on June 6, 2007. *People v. Frazier*, 478 Mich. 231 (2007), *rehearing denied*, July 16, 2007, 478 Mich. 1201. [Appendix 1a-44a, 151a]

Respondent Corey Ramone Frazier appealed by right to the Michigan Court of Appeals his 1996 Genesee County jury-based convictions of two counts of first degree felony murder, MCL 750.315; two counts of possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b; and

armed robbery, MCL 750.529. Respondent's murder and felony-firearm convictions were affirmed and the conviction for armed robbery was vacated on double jeopardy grounds. *People v. Frazier*, CA 193891 (Feb. 27, 1998) [Appendix 123a-146a]; *People v. Frazier* (*on rehearing*), CA 193891 (Apr. 21, 2000) [Appendix 111a-122a] In *People v. Frazier* (*after remand*), CA 193891 (Apr. 21, 2000), the Court rejected respondent's ineffective assistance of counsel argument, relying on *Strickland v. Washington*, 466 U.S. 668 (1984). The Michigan Supreme Court denied leave to appeal in *People v. Frazier*, 464 Mich. 851 (2001) (Cavanagh and Kelly dissenting). [Appendix 98a-99a] The United States District Court for the Eastern District of Michigan conditionally granted respondent's petition for *habeas corpus*. The Court determined that the Michigan Court of Appeals application of the *Strickland v. Washington*, 466 U.S. 668 (1984) ineffective assistance of counsel review standard instead of the *Cronic v. United States,* 466 U.S. 648 (1984) analysis, was an unreasonable application of clearly established federal law. The federal court's conditional grant of the writ was based on its determination that retained counsel had abandoned respondent during police interrogation and ruled that in the event of a retrial, respondent's confession would be inadmissible. *Frazier v. Berghuis*, 02-CV-71741DT (Aug. 6, 2003), 2003 WL 25195212 [Appendix 80a-98a]

The case was set for retrial in the Genesee County Circuit, and the trial court, Ransom, J.,

purportedly following the *Berghuis habeas* decision, ruled that the exclusionary rule not only applied to defendant's confession, but that the street sweepers' testimony would be permitted only if the prosecution could show that the identity of these witnesses would have been inevitably discovered. The Prosecutor appealed, and the Michigan Court of Appeals in *People v. Frazier*, 270 Mich. App. 172 (2006) affirmed in part, based on its determination that the exclusionary rule applied to the street sweepers' testimony and remanded for application of the inevitable discovery doctrine. On grant of the prosecution's application for leave to appeal, the Michigan Supreme Court held the defendant's claim of ineffective assistance of counsel as grounds for barring respondent's confession was governed by *Strickland* and not *United States v. Cronic*, thus finding that the federal *habeas* decision was constitutionally infirm. The Court then vacated the Court of Appeals' endorsement of the federal court's opinion "to the extent that it adopts or approves the federal district court's endorsing the *Cronic* standard." [Appendix 2a, 3a, 6a, 9a-17a] Notwithstanding this determination, the Supreme Court said "we cannot disturb the erroneous ruling of the district court." [Appendix 17a] The Court denied the prosecutor's request to reinstate respondent's convictions variously holding that the prosecutor had forfeited the argument, or that the *habeas corpus* decision was *res judicata*, or that to grant the prosecutor's request would cause unnecessary confusion and uncertainty. [Appendix 10a, 11a] The prosecutor's request for rehearing was denied on July 16, 2007. [Appendix 151a]

The People of Michigan, Petitioner, respectfully request that a *writ of certiorari* will issue, directing the Michigan Supreme Court to reinstate respondent's convictions and sentences for two counts of felony murder and one count of felony firearm.

REASONS FOR GRANTING THE WRIT

The case *sub judice* presents issues of substantial significance regarding the Sixth Amendment and related issues concerning the administration of federal *habeas corpus* jurisdiction.

The United States Supreme Court decisions which established that the doctrine of *res judicata* does not prevent federal courts from re-examining state court decisions have been the subject of exhaustive discussion, but virtually no attention has been given the reciprocal question of whether state courts may subsequently relitigate the issues decided in the federal courts. 80 Yale L.J., 1229 (May, 1971), Note Constitutional Collateral Estoppel: A Bar to Relitigation of Federal *Habeas* Decisions.

The federal district court in the case *sub judice* [*Frazier v. Berghuis*, 02-CV-71741-DT (Aug. 6, 2003), 2003 WL 25195212 [Appendix 80a-97a] conditionally granted respondent's request for *habeas corpus* relief where it declared that the Michigan Court of Appeals' application of *Strickland v. Washington*, 466 U.S. 668 (1984) ineffective assistance of counsel standard rather than a *United States v. Cronic*, 466 U.S. 648

(1984) analysis in *People v. Frazier*, (*after remand)* CA 193891 (Apr. 21, 2000) [Appendix 100a, 107a-110a] was an unreasonable application of clearly established federal law.

Following the conditional grant of *habeas corpus*, the prosecutor in *People v. Frazier,* 270 Mich. App. 172 (2006) [Appendix 45a-79a] requested interlocutory review of issues concerning the calling of certain street-sweeper witnesses and impeachment of respondent, all of which were litigated on the Court of Appeals' assumption that retrial proceedings were governed by the law of the case doctrine, [*Frazier, supra,* Appendix 51a, 70a] whereas the prosecutor in the Michigan Supreme Court urged that the federal court wrongly decided respondent's ineffective assistance of counsel claim, and requested the Michigan Supreme Court to ignore the federal court opinion and thus reinstate respondent's convictions if the Court agreed. The Michigan Supreme Court agreed with the prosecutor, and in a seven page discussion, held that the federal court opinion was constitutionally infirm, and vacated the Court of Appeals' opinion to the extent that it "adopts or approves" the federal court decision endorsing the *Cronic* standard. The Court denied the prosecutor's request to reinstate respondent's convictions and variously held that the prosecutor forfeited the argument, or that an opinion granting the requested reinstatement would cause unnecessary confusion and uncertainty, but ultimately held that the common law doctrine of *res judicata* required the conducting of a retrial notwithstanding its determination that the

federal court *habeas* decision was constitutionally infirm. [Appendix 10a-17a]

ARGUMENT

The Michigan Supreme Court's denial of petitioner's request to reinstate respondent's felony murder and related convictions and sentences on grounds of forfeiture, or *res judicata,* or because a decision of reinstatement would cause unnecessary confusion and uncertainty, is inappropriate and legally unacceptable where the Michigan Supreme Court determined that the federal court's *habeas corpus* decision in *Frazier v. Berghuis*, 02-CV-71741-DT (Aug. 6, 2003), 2003 WL 25195212 is constitutionally infirm and vacated the Michigan Court of Appeals published opinion to the extent that it adopted or approved the federal district court's decision endorsing *Cronic v. United States*, 466 U.S. 648 (1984). [Appendix 10a-17a]

I. Persuasive reasons for relief from forfeiture. The consequences of failure to advance an issue on appeal with the result that there is no appellate decision on the issue are not always the same as the consequences of advancing an issue and provoking an actual decision. See, e.g., 18 B FPP section 4478.6. "[A]ny forfeiture from failure to raise an issue in an initial appeal is far from absolute, especially where, as here, the party failing to present the issue was the appellee, defending on a field of battle defined by the appellant." *Yesudian ex rel. U.S. v. Howard Univ.*, 270 F.3d 696, 971 (C.A. D.C. 2001).

A.

The Michigan Supreme Court's denial of the prosecutor's request to reinstate respondent's convictions and sentences on the ground of forfeiture is unacceptable in this case. [Appendix 10a] The failure to appeal to the United States Court of Appeals is attributable to the Office of Michigan Attorney General handling this case on *habeas corpus* and not the office of Genesee County Prosecuting Attorney. The failure to urge reinstatement in the trial court, or to raise the argument in the Court of Appeals, is not a legal ground for not granting the prosecutor's prayer for relief because there is no procedure for doing so in either the trial court or the Court of Appeals and none was identified or referred to by the Michigan Supreme Court in its opinion in this case. [Appendix 10a] Also, an intellectually honest appraisal of the prosecutor's application for leave to appeal cannot be construed to constitute a waiver or forfeiture of the issue of the propriety of the federal court's decision. This is especially so where the prosecutor argued, and the Michigan Supreme Court agreed that the federal court decision was erroneous and thus constitutionally infirm. [Appendix 9a-10a]

In *Taylor v. Illinois*, 484 U.S. 400 (1988) this Court rejected the argument that the Illinois State Court finding of waiver of federal claims as a matter of state law should preclude United States Supreme Court review as a matter of federal law.

"[W]e have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry v. Mississippi*, 379 U.S. 443, 447, 85 S. Ct. 564, 567, 13 L. Ed. 2d 408 (1965). Specifically, it is well established that where a state court possesses the power to disregard a procedural default in exceptional cases, the state court's failure to exercise that power in a particular case does not bar review in this Court. *Williams v. Georgia*, 349 U.S. 375, 383-384 (1955).

The Michigan Supreme Court has deviated from its procedural default rules in the face of exceptional circumstances. *Perin v. Pueler*, 373 Mich. 531, 534 (1964) [overruled on other grounds in *McDougall v. Schanz*, 461 Mich. 15 (1991) (issue resolution was necessary to quell confusion generated by Court's earlier opinion); *People v. Snow*, 386 Mich. 586, 591 (1972). (addressed issue to prevent miscarriage of justice). cf., also *Curtis v. Duval*, 124 F.3d 1 (CA 1 1997) citing *Caspari v. Bohlen*, 510 U.S. 383 (1994). The decisions also indicate that a state may not become picayune in enforcing a procedural requirement, to the extent that form is stressed over any possible state interest in enforcing the requirement. *Henry v. Mississippi*, 379 U.S. 443, 13 L. Ed. 2d 408, 85 S. Ct. 564, *reh. den.*, 380 U.S. 926, 13 L. Ed. 2d 813, 85 S. Ct. 878, *and on remand* (Miss.) 198 So. 2d 213, *reinstated* (Miss.) 202 So. 2d 40, *cert. den.*, 392 U.S. 931, 20 L. Ed. 2d 1389, 88 S. Ct. 2276.

Although the Michigan Supreme Court declined to exercise this discretion, in the case *sub judice*, under *Williams v. Georgia*, such decision does not bar merits review by this Honorable Court, despite the state-law claim of forfeiture or waiver.

B.

Petitioner further submits that the Michigan Supreme Court's denial of the prosecutor's request for reinstatement of respondent's convictions because a decision granting reinstatement would cause "unnecessary confusion and uncertainty" is unacceptable. [Appendix 11a]

The proper function of the courts is to administer justice in accordance with the established rules of law by applying the law.

The duty of a state's supreme court is to act as the final and ultimate authority in stating what is the law of the state . . . See 20 Am. Jur. 2d Courts, VI Functions, Powers, and Duties, Section 32 Administration of justice, generally, determining law; role of public policy. (Footnote citations omitted)

C.

Petitioner respectfully requests that this Honorable Court review the Michigan Supreme Court's denial of the prosecutor's request to reinstate respondent's felony murder and related convictions and sentences where the Court determined that the

federal court *habeas corpus* decision is constitutionally infirm.

In this case the Michigan Supreme Court analyzed the constitutionally infirm *habeas* decision as follows:

> Nonetheless, because our Court of Appeals approved the federal district court's legal analysis in a published opinion, we must discuss the correctness of this analysis. Fn9 We agree with the prosecution that the correct Sixth Amendment analysis is the ineffective assistance of counsel test of *Strickland*, *supra*, rather than the presumed prejudice test of *Cronic*, *supra*. [Appendix 12a]

In Fn. 9 of the majority opinion explains:

> The dissent would have U.S. leave unquestioned the federal district court's analysis. But the Court of Appeals opinion approving the district court's analysis is published and is binding precedent for the Court of Appeals and lower courts. MCR 7.215(j)(1). Even if the Court of Appeals approval of the district court's opinion is dicta, we will not allow that dicta to stand when it appears in a precedentially binding opinion and is erroneous. We decline to follow the dissent's suggestion to vacate the Court of Appeals dicta without any explanation of why we are doing so. Rather, the parties and the bench and bar benefit when we explain the reasoning underlying our rulings. Further, although the district court's decision is binding on the admissibility of defendant's confession, the district court did

> not decide whether the street sweepers' testimony is admissible. If defendant is convicted on retrial, this issue will likely be raised on appeal in the Michigan courts and on habeas review in federal court. Our review of this issue at this juncture will aid those courts that might be required to review this issue in the future. It will also contribute to the broader debate regarding the proper application of the *Cronic* and *Strickland* standards. [Appendix 12a]

The Michigan Supreme Court thereafter engages in an intellectual and sophisticated analysis of *Strickland* and *Cronic* and properly concludes that the Court of Appeals' application of *Strickland* to respondent's ineffective assistance of counsel claim was correct and that the federal district court's analysis was erroneous. [Appendix 13a-17a]

Under this Court's decisions any issue "pressed or passed upon below" by a federal court, *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted), is subject to this Court's broad discretion over the questions it chooses to take on *certiorari*. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 528-530 (2002)

In the case *sub judice* the federal district court, the Michigan Court of Appeals, and finally, the Michigan Supreme Court in *People v. Frazier*, 478 Mich. 231 (2007) passed on a significant issue concerning respondent's claim of ineffective assistance of counsel under the Sixth Amendment.

In *United States v. Wilson*, 504 U.S. 361 (1992), fn. 5 the Court states "Where *certiorari* is sought to a state court it has been said that "due regard for the appropriate relationship of this Court to state courts," *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940), may suggest greater restraint in applying our "pressed or passed upon" rule. In that context, the absence of challenge to a seemingly settled federal rule deprives the state court of an opportunity to rest its decision on an adequate and independent state ground." In *Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991) on the other hand, it was said "It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided."

One hundred and eight years ago the Wisconsin Supreme Court in *State v. Huegin*, 110 Wis. 189 (1901) observed that there were reported decisions to the effect than an adjudication in *habeas corpus* proceedings is not binding in a subsequent suit to vindicate the same right between the parties, or a suit between such parties where the same question is material. That doctrine was based on a supposed common-law rule that a decision on *habeas corpus* is not subject to review on appeal or writ of error. The Court further explained that the doctrine was modified by judicial policy in many jurisdictions and in others displaced by statute. The state of Wisconsin changed the common law rule by statute so that the

doctrine of *res judicata* had the same applicability to *habeas corpus* proceedings as to other suits.

In *Chambers v. Cox*, 400 U.S. 870 (1970), Justice Brennan, dissenting from a denial of *certiorari*, argued the writ should be granted where the case presented the important question of the *res judicata* effect of a federal court's determination that evidence used to obtain a state court conviction was improperly admitted because it was the fruit of an unconstitutional search and seizure. Justice Brennan stated that while the question of the application of *res judicata* has been decided in the case of the denial of *habeas* relief, citing *Sanders v. United States*, 373 U.S. 1 (1963), the *res judicata* effect of a *habeas* judgment granting the writ remains a debatable question. *Collins v. Loisel*, 262 U.S. 426, 430 (1923) is cited as authority for the proposition that a *habeas* judgment granting the application constituted *res judicata* as to the illegality of the custody and of all issues of law and fact necessarily involved in that result. He points out, however, that federal and state courts have given varying scope to this pronouncement and aptly states "Thus, considerable confusion (as evidenced by the present case), has developed over the appropriate scope of the principle of *res judicata* in cases in which the prisoner obtains *habeas* relief, and over the issues to which it ought properly to apply if it is applicable.

In denying petitioner's request to ignore the federal court *habeas* decision and to reinstate respondent's convictions the Michigan Supreme Court said:

> . . . [habeas corpus decisions within their scope generally are binding on the parties, on other courts, and are conclusive. . . . A judgment in habeas corpus discharging the prisoner, after a final determination of the ultimate facts and of the law, is conclusive of the right to remain at liberty. Therefore, the release by federal courts of one charged in state courts is binding on the latter, and there can be no further prosecution. [4 Gillespie, Michigan Criminal Law & Procedure (2d ed.), sec. 147:117, p. 793. See also *Collins v. Loisel*, 262 U.S. 426, 430, 43 S. Ct. 618, 67 L. Ed. 1062 (1923) (holding that a habeas corpus decision operates as res judicata on the issues of law and fact necessarily involved in the habeas corpus proceedings); *Kurtz v. State*, 22 Fla. 36, 45 (1886) ("[I]n those states where a judgment of a court in a habeas corpus proceeding discharging or remanding to custody a prisoner is final, and a writ of error is allowed thereon, . . . the principle of res judicata [**seems to be**] applicable . . . " [emphasis added]

Notwithstanding the above discussion, respondent in this case was not released or discharged, but was granted a conditional writ of *habeas corpus* for retrial.

D.

The Michigan Supreme Court's *res judicata* position for denying the prosecutor's request to reinstate respondent's convictions and sentences should

be reviewed by this Honorable Court on grant of Petitioner's request for *certiorari.*

Petitioner initially observes that while the doctrine of *res judicata* prohibits repetitive litigation, the decisions indicate that it does not prohibit appellate review of claims rejected by a lower court. See, e.g., *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536 (CA 9 1991); *McClain v. Apodaca,* 793 F.2d 1031 (CA 9 1986). The Michigan Supreme Court chose to ignore this jurisprudence in denying petitioner's motion for rehearing. [Appendix 151a]

The decisions also state that "An issue is not considered waived, . . . if a party did not at the time of the purported waiver, have both the opportunity and an incentive to raise it . . . on appeal." *United States v. Quintieri*, 306 F.3d 1217, 1299 (D.C. Cir. 2001). (citations omitted) See also *Aviall, Inc. v. Ryder System, Inc.*, 110 F.3d 892, 898 (2d Cir. 1997) ("when there has been no review even though an appeal has been taken, it is equivalent to the party not having had an opportunity to appeal, and *prevents the challenged decision from becoming the law of the case* [] "). See *Oneida Indian Nation of New York v. County of Oneida*, 214 F.R.D. 83 (N.D.N.Y. 2003)

When the prosecutor in the case *sub judice* was pursuing the State's interlocutory appeal in *People v. Frazier*, 270 Mich. App. 172 (2006) in an emergency review setting there was no reason to be challenging or even thinking about the *res judicata* effect of the federal court decision. The prosecutor's only intent at

that time was to obtain reversal of two erroneous rulings of the trial court on questions of the two witnesses [street sweepers] who had already testified at respondent's trial and the question of impeaching respondent with his confession if he testified at the retrial and gave testimony inconsistent with his confession. [Appendix 45a-79a]

Petitioner respectfully submits that review in this case is somewhat complicated by the Michigan Supreme Court's apparently inconsistent legal conclusions.

The Michigan Supreme Court perceived its jurisprudential responsibility in this case as requiring that it compel the conducting of a retrial, notwithstanding its finding that the federal court *habeas* decision is constitutionally infirm. [Appendix 2a, 3a, 6a, 9a-17a] Petitioner, for its part, submits that it is decisions such as this that bestirs the public to ridicule the judicial process. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

In 80 Yale L.J., 1229 (May 1971), Note Constitutional Collateral Estoppel: A Bar to Relitigation of Federal *Habeas* Decisions, the author states that United States Supreme Court decisions establishing that the doctrine of *res judicata* does not prevent federal courts from re-examining state court decisions have been the subject of exhaustive discussion, but **virtually no attention has been given the reciprocal question of whether state courts may**

subsequently relitigate the issues decided in the federal courts.

In 38 Yale L.J., 299 (January 1929), *Res Judicata*, author Robert von Mochzisker, aptly states at the end of his article:

> . . . even in those jurisdictions which view res judicata strictly as a matter of public policy, and administer the doctrine accordingly, situations may arise where the general welfare is best served by a relitigation of issues formerly decided.

In *Ex parte Heller*, 146 Wis. 517 (1911) (abrogation recognized by *McCleskey v. Zant*, 499 U.S. 467 (1991)), the Wisconsin Supreme Court said that an order or judgment in a *habeas corpus* suit is *res judicata* as to the person charged with unlawfully restraining another of his liberty, until reversed in some proper proceeding, but just what constitutes a "proper proceeding" is not identified or suggested.

In *McCleskey v. Zant*, 499 U.S. 467 (1991) Justice Kennedy states:

> "We resolved the confusion over the continuing validity of the common-law rule, at least for federal courts, in *Salinger v. Loisel*, 265 U.S. 224, 44 S. Ct. 519, 68 L. Ed. 989 (1924), and *Wong Doo v. United States*, 265 U.S. 239, 44 S. Ct. 524, 68 L. Ed. 999 (1924). These decisions reaffirmed that *res judicata* does not apply "to a decision on habeas corpus refusing to discharge the prisoner."

> *Salinger v. Loisel*, *supra*, at 230, 44 S. Ct. at 521; see *Wong Doo v. United States*, *supra*, at 240, 44 S. Ct. at 5425. They recognized, however, that the availability of appellate review required a modification of the common-law rule allowing endless applications. As we explained in *Salinger*: "In early times when a refusal to discharge was not open to appellate review, courts and judges were accustomed to exercise an independent judgment on each successive application, regardless of the number. But when a right to an appellate review was given the reason for that practice ceased and the practice came to be materially changed. . . ." 265 U.S. at 230, 231, 44 S. Ct. at 521.

McCleskey, *supra*, does not answer the question of whether the State can relitigate the issue decided by the federal court in a *habeas corpus* proceeding.

The Michigan Court of Appeals opined that the law of the case doctrine required that it was bound by the federal court *habeas* decision. [Appendix 51a, 70a]

In the Michigan Supreme Court, petitioner argued that the law of the case doctrine was not controlling and requested that the Court ignore the federal court's decision to reinstate respondent's convictions and sentences. [Appendix 9a, 10a]

The law of the case doctrine applies when a federal court reviews matters previously considered in state court involving the same parties. *Gage v. General Motors Corp.*, 796 F.2d 589, 593 (CA 9 1985).

On the other hand, the law of the case controls unless the first decision is clearly erroneous and would result in manifest injustice, an intervening change in the law has occurred, or the evidence on remand is substantially different. *Waggoner v. Dallaire*, 767 F.2d 589, 593 (CA 9 1985). Even assuming that the law of the case principles apply, a court may make an exception in an appropriate case. *Castro v. United States*, 540 U.S. 375, 381, 383 (2003).

In the Michigan Supreme Court petitioner, citing the works of the late Charles Alan Wright, maintained that the law of the case doctrine would not prohibit the court from reaching a result contrary to the *habeas* decision of the federal court. Petitioner cited 18 B Fed. Prac. & Proc. Juris. 2d section 4478, Law of the case at p. 672:

> Perhaps the most obvious justifications for departing from the law of the case arise when there has been an intervening change of law outside the confines of the particular case. The easiest cases occur when the law has been changed by a body with greater authority on the issue – a court in the hierarchy of a single court system, [*Pescatore v. Pan American World Airways Inc.*, 97 F.3d 1, 7-12 (CA 2 1996) – A later Supreme Court decision established a different rule warranting departure from the law of the case to reflect the intervening change of controlling law.] a state court developing state law that controls a decision by a federal court.

[*Blair v. Sealift, Inc.*, 912 F.3d 755, 760-762 (CA 5 1996).]

Petitioner argued in the Michigan Supreme Court that the *Blair* decision is authority for the proposition that a state appellate court decision may constitute subsequent, controlling authority that overrides an earlier determination by the federal court. In *Blair*, on remand, the district court concluded that the court of appeals' ruling had been superseded by a later decision of the Louisiana Court of Appeals, and departed from the mandate. The district court was correct. The later appellate decision was "subsequent, controlling authority that overrides an earlier determination by this court."

Petitioner herein thus argued that in a case such as the case *sub judice,* where the federal *habeas* decision is clearly erroneous in its application of *Cronic,* when contrasted with the Michigan Court of Appeals proper application of *Strickland* in *People v. Frazier*, CA 193891 (April 21, 2000), then the Michigan Supreme Court should grant the prosecutor's request to reinstate respondent's convictions and sentences. [Appendix 100a, 107a-110a]

This Court has refined the scope of the prohibition against government appeals under the Double Jeopardy clause. It does not preclude an appeal where a post-verdict ruling appealed by the prosecution would not necessitate a second trial of the defendant and a successful governmental appeal would simply reinstate the guilty verdict. *United States v.*

Wilson, 420 U.S. 332, 353 (1975). Reinstatement of the finding of guilt rather than the conducting of further proceedings on the question of guilt is most appropriate. A similar result was reached in *United States v. Ceccolini*, 435 U.S. 268, 277 (1978).

The Michigan Supreme Court agreed with the petitioner that the federal *habeas* decision was constitutionally infirm, but denied the request to reinstate respondent's convictions relying primarily on the doctrine of *res judicata*. This is where the Michigan Supreme Court went wrong. [Appendix 10a-11a]

Following the Michigan Supreme Court's decision, petitioner filed for rehearing arguing that *res judicata* should not preclude the granting of the request to reinstate respondent's convictions and sentences.

47 Am. Jur. 2d, Judgments, section 509, p. 68-69, Irregular or erroneous nature of judgment provides:

> A judgment does not lose its effectiveness as res judicata from the mere fact that it is irregular or erroneous. Until set aside or corrected in a manner authorized by law, an erroneous decision is as binding as a correct ruling. Consequently, the doctrine of res judicata is not dependent upon the correctness of the judgment.

47 Am. Jur. 2d, Judgments, section 532, p. 88, 89, Effect of vacation or reversal of judgment provides:

> The doctrine of *res judicata* applies where there is a valid, existing final judgment. The doctrine of *res judicata* prevails as long as the underlying judgment remains in full and operative effect and has not been disturbed. On the other hand, a judgment is inoperative as *res judicata* where it has been
>
> – set aside
>
> – vacated, as by the granting of a new trial
>
> – reversed by an appellate court

Under the decisions, "a judgment based upon collateral estoppel or *res judicata* is no longer valid when the decisions on which the court relied in applying either of the doctrines has been reversed. *Adams v. Jonathan Woodner Co.*, 475 A.2d 393, 397 (D.C. 1984). "Reversal of a decision renders it invalid, and application of collateral estoppel clearly should not be based upon an invalid decision." *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539, 546 (CA 5 2001).

More importantly, under United States Supreme Court jurisprudence, to have the preclusive effect of *res judicata*, a prior judgment cannot be constitutionally infirm. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 (1982). See also *Citizens Ins. Co. of America v. Daccach*, 217 S.W.3d 430 (Tex. 2007); *Giakoumelos v. Coughlin*, 88 F.3d 56, 61 (CA 2 1996).

Since the Michigan Supreme Court determined that the federal district court's decision is constitutionally

infirm, the preclusive effect of *res judicata* should have been determined to be inapplicable and the petitioner's request for reinstatement of respondent's convictions and sentences should have been granted.

In the words of the Court in *Williams v. Georgia*, *supra*,

> . . . [w]here a State allows questions of this sort to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner.

While an independent state ground of decision may bar further review in the Supreme Court, the state court cannot divest the Supreme Court of jurisdiction to reach an issue of federal law by merely basing its decision on the common law. See 4 Am. Jur. 2d Appellate Review section 47, fn. 63, citing *West Chicago St. R. Co. v. Illinois*, 201 U.S. 506 (1906); *Chicago, B. & Q. R. Co. v. Illinois*, 200 U.S. 561 (1906).

Under the facts of this case and the jurisprudence this Honorable Court should be persuaded to grant Petitioner's request for certiorari to the Michigan Supreme Court.

This Court should grant *certiorari* to clarify the applicability of the doctrines of the law of the case and *res judicata* to conditional grants of federal *habeas corpus* returning criminal cases to state court for further proceedings where there is no recent United States Supreme Court jurisprudence in this regard and there appears to be a split of opinion within the United States Courts of Appeals and state courts.

II. Persuasive reasons why it is necessary that this Court grant certiorari in the case sub judice.

The increasing number of prisoner filings under 28 U.S.C.A. section 2254 and conditional grants of *habeas corpus* relief, with no clear guidance on questions concerning whether there can be relitigation in state courts of the basis for the granting of the writ, should compel this Court to grant certiorari and give guidance to the bench and the bar concerning the application of the doctrines of the law of the case and *res judicata.*

Law-of-the-case terminology is often used to address the question whether to deny appellate review of an issue that has not been properly preserved in a lower court, or that has not been presented to the court of appeals in an orderly way.

Courts are understandably reluctant to reopen a ruling once made. This general reluctance is augmented

by comity concerns when one judge or court is asked to reconsider the ruling of a different judge or court. Reluctance, however, does not equal lack of authority. The constraint is a matter of discretion. So long as the same case remains alive, there is power to alter or revoke earlier rulings. 18 FPP section 4478, Chapter 13 *Res Judicata*, H. Other Topics.

At least one court has said that attempts to explain the distinction between the law of the case and *res judicata* "takes refuge in obscurity." *State v. Presler*, 731 A.2d 699, 704 n. 3 (R.I. 1999).

In the case *sub judice* the Michigan Supreme Court "**vacate[d]** the March 2006 published opinion of the Court of Appeals opinion to the extent that it adopts or approves of the federal district court's decision endorsing the *Cronic* standard." [Appendix 16a, 17a]

In 18 FPP section 4478 it is said that "Actual decision of an issue is required to establish the law of the case. Law of the case does not reach a matter that was not decided. [FN 19] . . . So too, **a finding that has been vacated ceases to be the law of the case**; [FN 22] . . .] citing *Brown v. Bryan Cty.*, 219 F.3d 450, 453, n.1 (CA 5 2000) where the earlier ruling had been vacated by the Supreme Court. "With this vacatur, our previous opinion is no longer the law of the case." See also *United States v. Simmons*, 923 F.2d 934, 956 (CA 2d 1991), *cert. denied*, 500 U.S. 919 (1991). Citing **Wright, Miller & Cooper**, the court in *Matter of Busick*, 65 B.R. 630, 633 (D.C. 1986), said

the law of the case "doctrine does not apply at all . . . when a higher court vacates the judgment of the lower court. In that case, neither court is constrained by the law of the case in subsequent proceedings, since the original 'law' no longer exists."

In 47 Am. Jur. 2d Judgments, section 471, it is stated that State Courts are generally free to develop their own *res judicata* rules for protecting against relitigation or the piecemeal resolution of disputes, citing *Richards v. Jefferson County, Ala.*, 517 U.S. 793 (1996). On the other hand, State Courts must apply federal rules in determining the preclusive effect of federal court decisions on issues of federal law, citing *Heck v. Humphrey*, 512 U.S. 477 (1994). See also, Restatement (Second) of Judgments § 87 (1982) "Federal law determines the effect under the rules of *res judicata* of a judgment of a federal court.")

Petitioner submits that, where the Michigan Supreme Court has vacated that portion of a published Michigan Court of Appeals' decision endorsing or approving a federal *habeas corpus* decision that is constitutionally infirm, under the jurisprudence of *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461 (1982), this Court should conclude that Petitioner's request to reinstate Respondent's convictions and sentences should have been granted.

CONCLUSION

Under the above-referenced decisions, where the Michigan Supreme Court has vacated the Michigan Court of Appeals decision adopting or approving the federal district court's decision endorsing the *Cronic* Standard, there should be no need to conduct a retrial in this case. This Honorable Court should agree and grant certiorari.

Date: September 26, 2007

Respectfully submitted,

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Michigan Supreme Court
Lansing Michigan

Opinion	Chief Justice:	Justices:
	Clifford W. Taylor	Michael F. Cavanagh
		Elizabeth A. Weaver
		Marilyn Kelly
		Maura D. Corrigan
		Robert P. Young, Jr.
		Stephen J. Markman

FILED JUNE 6, 2007

PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellant,

v. No. 131041

COREY RAMONE FRAZIER,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

CORRIGAN, J.

This 1995 murder case has a long history in the Michigan and federal courts. Following the affirmance of defendant's convictions in our state courts, the United States District Court for the Eastern District of Michigan, on habeas corpus review, ordered defendant's release unless he was given a new trial in which his confession would be excluded from evidence. The district court ordered this result

because of retained counsel's deficient performance, not because of any police misconduct.

During pretrial hearings, the trial court also suppressed the testimony of two witnesses – street sweepers whose identities were "fruits" of defendant's confession – unless the prosecution could show that it discovered the street sweepers' identities from an independent source. Following the prosecution's interlocutory appeal, the Court of Appeals agreed that the trial court should conduct an "inevitable discovery" hearing.

We granted the prosecution's application for leave to file an interlocutory appeal to consider the proper scope of the exclusionary rule as it applies to the testimony of the street sweepers. We reverse the Court of Appeals expansive holding that the exclusionary rule applies to the testimony of the street sweepers. Because defendant's confession did not result from police misconduct, the purpose of the exclusionary rule is in no way served by excluding the street sweepers' testimony. Further, the degree of attenuation between the violation of defendant's Sixth Amendment rights and the street sweepers' testimony dissipated any taint.

We also vacate the Court of Appeals endorsement of the federal district court's errant legal analysis in holding that defendant's confession must be excluded. The district court mistakenly applied the test from *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), rather than the test from

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), in holding that defendant's Sixth Amendment rights had been violated. Nonetheless, despite the federal district court's faulty analysis, we acknowledge the binding force of the district court's ruling excluding defendant's confession. We remand this case for retrial at which the street sweepers' testimony may be admitted.[1]

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Two victims were robbed and fatally shot in one of the victim's homes in Grand Blanc, Michigan. Kenneth Haywood told the police that he drove defendant and defendant's accomplice, Idell Cleveland, to the home on the night of the murders and waited in the car while defendant and Cleveland entered the home. Haywood heard Cleveland say, "Get on the floor" and then heard two gunshots. Haywood fled, leaving defendant and Cleveland in the house without transportation from the scene.

After interrogating Haywood, the police searched defendant's home and obtained an arrest warrant. Defendant's mother retained an attorney for him. Defendant told that attorney that, although he had been present when Cleveland robbed and murdered

[1] We do not disturb the Court of Appeals holding that defendant's statements are admissible for impeachment purposes, which is not at issue in this appeal.

the victims, he did not know that Cleveland intended to rob the victims and he had not been involved in the murders. Defendant told counsel that he wanted to talk to the police about his noninvolvement in the crimes. Relying on defendant's assertions of innocence, defense counsel advised defendant that one option would be to talk to the police and tell the truth. Counsel then arranged defendant's surrender and accompanied him to the station, where defendant was arrested and later arraigned. Although the prosecutor told defendant and his counsel that he would not plea bargain or make any "deals," defendant nonetheless insisted on talking to the police. Defense counsel also advised defendant that talking to the police might assist in efforts to negotiate a plea bargain. Defense counsel was present when the police furnished *Miranda*[2] warnings and when defendant waived those protections. Defense counsel then left the police station before defendant was interrogated because he assumed that he could not be present during questioning.

During the police interrogation, defendant, contrary to what he told defense counsel, admitted that he knew Cleveland had been armed and had intended to rob the victims. He also admitted that Cleveland paid him with two $50 bills after the murders. He told the police that two street sweepers gave him a ride home after the murders and that he

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[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

asked them to change a $50 bill. The police later located the street sweepers, who testified that defendant approached them for a ride at a gas station and asked if they had change for a $50 bill.

Following his 1996 jury trial, defendant was convicted of two counts of felony-murder, MCL 750.316; one count of armed robbery, MCL 750.529; and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The Court of Appeals initially affirmed defendant's murder and felony-firearm convictions, but vacated his armed robbery conviction on double jeopardy grounds. *People v. Frazier,* unpublished opinion of the Court of Appeals, issued February 27, 1998 (Docket No. 193891). The Court of Appeals then granted rehearing and again vacated defendant's armed robbery conviction on double jeopardy grounds, but remanded "for a *Ginther*[3] hearing on the issue whether defendant was denied the effective assistance of counsel by trial counsel's advice that he made statements to the police about his role in the crime." *People v. Frazier (On Rehearing),* unpublished opinion per curiam of the Court of Appeals, issued August 7, 1998 (Docket No. 193891), slip op. at 2. On remand, the trial court concluded after a *Ginther* hearing that counsel had not been ineffective. The Court of Appeals affirmed, *People v. Frazier (After Remand),* unpublished opinion per curiam of the Court of Appeals, issued April

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[3] *People v. Ginther,* 390 Mich. 436, 212 N.W.2d 922 (1973).

21, 2000 (Docket No. 193891), and this Court denied leave to appeal, 464 Mich. 851 (2001).

The United States District Court for the Eastern District of Michigan conditionally granted defendant's petition for a writ of habeas corpus on the ground that counsel abandoned defendant during the police interrogation in violation of defendant's Sixth Amendment right to counsel under *Cronic, supra*. *Frazier v. Berghuis*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 6, 2003 (Docket No. 02-CV-71741DT). The federal district court ruled that counsel's absence during a critical stage (the interrogation) "tainted the whole trial process, as evidenced by the use of Petitioner's statements at trial." *Id.*, slip op. at 7. The court held that "the only appropriate remedy is to not allow use of the tainted statements, should the State decide to initiate a new trial in this matter." *Id.* Thus, the district court ruled that defendant's confession would be inadmissible on retrial. The prosecution did not further appeal this decision.

The case was then set for retrial in the Genesee Circuit Court. Before trial, the trial court excluded defendant's custodial statements for all purposes. The court, citing *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), also held that the exclusionary rule applied to any derivative evidence from those statements, including the testimony of the street sweepers. The court stated that "knowledge gained by the government's own wrong cannot be used by it in the way proposed." The court also held,

however, that the prosecution could call the street sweepers to testify at trial if the prosecution could establish that it in fact discovered the identity of these witnesses from a source independent of defendant's inadmissible statements. The prosecution appealed.[4]

A split Court of Appeals panel affirmed in part and reversed in part. *People v. Frazier,* 270 Mich.App. 172, 715 N.W.2d 341 (2006). The majority first agreed with the federal district court that the prosecution could not use defendant's custodial statements in its case-in-chief because counsel had abandoned defendant at a critical stage of the proceedings (the police interrogation).[5] But the panel, citing *Michigan v. Harvey,* 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990), unanimously[6] reversed the trial court's order prohibiting the use of defendant's custodial statements for impeachment purposes.

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[4] Because the prosecution appealed the trial court's decision, the trial court never held a hearing regarding whether the police would have inevitably discovered the street sweepers' identities.

[5] In his partial dissent, Judge Talbot stated that whether defendant's Sixth Amendment rights were violated was not an issue before the Court. Judge Talbot stated that he was not sure of the correctness of the federal district court's decision that defendant was denied his right to counsel, but that the Court of Appeals was bound by the unchallenged federal court determination.

[6] Judge Talbot joined the majority on this point.

The majority next held that the exclusionary rule and the "inevitable discovery" doctrine applied to the street sweepers' testimony. The majority explained that the United States Supreme Court has applied the exclusionary rule to Sixth Amendment violations, and that the street sweepers' testimony is "fruit of the poisonous tree" that must be excluded unless the prosecution can make an affirmative showing that the street sweepers' identities would have inevitably been discovered through alternative means.[7] The majority remanded to the trial court for application of the inevitable discovery doctrine.

Judge Talbot dissented from the majority's holding that the exclusionary rule and the inevitable discovery doctrine apply to the street sweepers' testimony. He opined that the exclusionary rule does not apply in the absence of police misconduct, and that the majority extended the doctrine by applying it to the testimony of witnesses named in defendant's statement to police. Further, Judge Talbot opined that the police almost certainly would have discovered the identities of the street sweepers if defense counsel had been present at the interrogation or even if defendant had not made any statement to the police.

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[7] But the panel disagreed with the trial court that the prosecution was required to show that it *actually* discovered the street sweepers' identities through independent legal means.

This Court granted the prosecution's application for leave to appeal and denied defendant's application for leave to cross-appeal. *People v. Frazier,* 477 Mich. 851, 720 N.W.2d 747 (2006). We directed the parties to address the following issues:

> (1) whether the exclusionary rule applies to fruits of a confession extracted not by police misconduct, but by the abandonment of retained counsel during the interrogation, a critical stage of proceedings, in violation of *United States v. Cronic,* 466 U.S. 648 (1984); and, if so, (2) whether the inevitable discovery doctrine of *Nix v. Williams,* 467 U.S. 431 (1984), applies in such circumstances; and, if so, (3) whether the exclusionary rule should be applied narrowly as suggested in *United States v. Ceccolini,* 435 U.S. 268 (1978), when the information derived from the confession is the identity of witnesses. [477 Mich. 851.]

II. STANDARD OF REVIEW

A lower court's application of constitutional standards is not entitled to the same degree of deference as are factual findings. *People v. Jenkins,* 472 Mich. 26, 31, 691 N.W.2d 759 (2005). Application of the exclusionary rule to a constitutional violation is a question of law that is reviewed de novo. *Id.*

III. THE *CRONIC/STRICKLAND* STANDARDS

The prosecution initially urges us to ignore the federal district court's decision and hold that the

exclusionary rule does not apply to bar defendant's confession from evidence. We decline this invitation because the prosecution has forfeited this argument. The prosecution never challenged the adverse district court decision by appealing to the United States Court of Appeals for the Sixth Circuit. Nor did the prosecution argue in the trial court or in our Court of Appeals that the federal district court decision should be disregarded. "This Court disfavors consideration of unpreserved claims of error." *People v. Carines*, 460 Mich. 750, 761, 597 N.W.2d 130 (1999). Moreover, the prosecution conceded in its application for leave to appeal in this Court that it is "bound by the unchallenged federal court determination." (Prosecution's Application for Leave to Appeal, p. v.) We decline to consider the prosecution's argument urging us to disregard the federal district court decision. Thus, the present issue is not the admissibility of defendant's confession, but the admissibility of the street sweepers' testimony.

In any case,

> [h]abeas corpus decisions within their scope generally are binding on the parties, on other courts, and are conclusive. . . . A judgment in habeas corpus discharging the prisoner, after a final determination of the ultimate facts and of the law, is conclusive of the right to remain at liberty. Therefore, the release by federal courts of one charged in state courts is binding on the latter, and there can be no further prosecution. [4 Gillespie, Michigan

> Criminal Law & Procedure (2d ed.), § 147:117, p. 793.]

See also *Collins v. Loisel,* 262 U.S. 426, 430, 43 S.Ct. 618, 67 L.Ed. 1062 (1923) (holding that a habeas corpus decision operates as res judicata on the issues of law and fact necessarily involved in the habeas corpus proceedings); *Kurtz v. State,* 22 Fla. 36, 45 (1886) ("[I]n those States where a judgment of a court in a *habeas corpus* proceeding discharging or remanding to custody a prisoner is final, and a writ of error is allowed thereon, . . . the principle of *res adjudicata* [seems to be] applicable. . . .").[8] In cases where the federal court conditionally grants a writ of habeas corpus, the federal court retains jurisdiction to ensure that the state court complies with the terms of the conditional writ. *Gentry v. Deuth,* 456 F.3d 687, 692 (C.A.6, 2006). A state's failure to cure the error identified in the conditional habeas court order justifies the release of the petitioner. *Id.* Moreover, we decline to contradict the federal court decision because doing so would create unnecessary confusion and uncertainty. Therefore, we accept as binding the district court's

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[8] Although the federal district court's habeas decision is binding on the parties in this particular case, it is not binding precedent for other cases. See *Abela v. Gen. Motors Corp.,* 469 Mich. 603, 606-607, 677 N.W.2d 325 (2004) ("Although state courts are bound by the decisions of the United States Supreme Court construing federal law, there is no similar obligation with respect to decisions of the lower federal courts." [Citations omitted.]).

ruling that defendant's confession must be excluded on retrial.

Nonetheless, because our Court of Appeals approved of the federal district court's legal analysis in a published opinion, we must discuss the correctness of this analysis.[9] We agree with the prosecution that the correct Sixth Amendment analysis is the ineffective assistance of counsel test of *Strickland, supra,* rather than the presumed prejudice test of *Cronic, supra.*

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[9] The dissent would have us leave unquestioned the federal district court's analysis. But the Court of Appeals opinion approving the district court's analysis is published and is binding precedent for the Court of Appeals and lower courts. MCR 7.215(J)(1). Even if the Court of Appeals approval of the district court's opinion is dicta, we will not allow that dicta to stand when it appears in a precedentially binding opinion and is erroneous. We decline to follow the dissent's suggestion to vacate the Court of Appeals dicta without any explanation of why we are doing so. Rather, the parties and the bench and bar benefit when we explain the reasoning underlying our rulings. Further, although the district court's decision is binding on the admissibility of defendant's confession, the district court did not decide whether the street sweepers' testimony is admissible. If defendant is convicted on retrial, this issue will likely be raised on appeal in the Michigan courts and on habeas review in federal court. Our review of this issue at this juncture will aid those courts that might be required to review this issue in the future. It will also contribute to the broader debate regarding the proper application of the *Cronic* and *Strickland* standards.

We also reject the dissent's suggestion that we have not genuinely attempted to execute the federal order. We have complied with that order, contrary to the prosecution's request that we violate the order by admitting defendant's confession. See n. 16 of this opinion.

Most claims of ineffective assistance of counsel are analyzed under the test developed in *Strickland, supra.* Under this test, counsel is presumed effective, and the defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error. *Strickland, supra* at 687, 690, 694. But in *Cronic, supra* at 659-662 the United States Supreme Court identified three rare situations in which the attorney's performance is so deficient that prejudice is presumed. One of these situations involves the complete denial of counsel, such as where the accused is denied counsel at a "critical stage" of the proceedings.[10] *Id.* at 659. "For purposes of distinguishing between the rule of *Strickland* and that of *Cronic,* [the] difference is not of degree but of kind." *Bell v. Cone,* 535 U.S. 685, 697, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002).

This case falls within the ambit of *Strickland* because none of the three *Cronic* situations is present. In their first meeting, defendant misled counsel. He said that he was present at the crime scene, but did not know that Cleveland intended to rob the

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[10] The other two situations in which prejudice is presumed are as follows: (1) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (2) where counsel is called upon to render assistance under circumstances where competent counsel very likely could not. *Cronic, supra* at 659-660.

victims. Defendant *insisted* on waiving his right to counsel and maintaining his innocence in a statement to the police in order to obtain a favorable plea bargain.[11] Counsel advised defendant of the risks of talking to the police and even advised him not to talk to the police despite his claims of innocence. Counsel, however, relied on defendant's assertions of innocence in advising defendant that he could talk to the police. Counsel's advice was predicated on defendant's false claim of innocence, and counsel cannot be faulted for advising defendant on the facts defendant had communicated to him.[12] What defendant ultimately told the police and what he told defense counsel were two different things. If defendant had given counsel the same version of events that he furnished the police, counsel would most likely have advised defendant differently.

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[11] In this postarraignment interrogation case, defendant had a Sixth Amendment right to counsel at the police interrogation, a critical stage of the proceedings. *Michigan v. Jackson*, 475 U.S. 625, 629-630, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). But an accused may waive his Sixth Amendment right to counsel if the waiver is knowing, intelligent, and voluntary. *People v. Williams*, 470 Mich. 634, 640, 683 N.W.2d 597 (2004). Defendant may, of course, even waive counsel at a critical stage of the proceedings. See, e.g., *United States v. Wade*, 388 U.S. 218, 237, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (holding that the defense counsel was required to be present at the lineup – a "critical stage" – absent an "intelligent waiver" by the defendant).

[12] Additionally, counsel, relying on the previous experience, believed that the prosecution might change its position and make a plea offer after defendant talked to the police.

The *Cronic* test applies when the attorney's failure is *complete,* while the *Strickland* test applies when counsel failed at specific points of the proceeding. *Bell, supra* at 697. Because counsel consulted with defendant, gave him advice, and did nothing contrary to defendant's wishes, counsel's alleged failure was not complete. Defendant alleges only that counsel erred at a specific point of the proceeding by advising him that he could waive his right to counsel at the interrogation. Therefore, prejudice may not be presumed, and counsel's performance should have been reviewed under the *Strickland* standard.[13]

Our determination that *Strickland* rather than *Cronic* applies is supported by *Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). In *Roe, supra,* the United States Supreme Court analyzed counsel's failure to file an appeal under the two-pronged test set forth in *Strickland* rather than the presumption of prejudice test set forth in *Cronic.* In doing so, it stated that the decision to waive the right to appeal, much like the decision to plead guilty and waive the right to a jury trial, belonged to the defendant. *Id.* at 485. The Court stated that when an attorney consults with his client about the consequences of his client's decision, the attorney's performance can be considered deficient under the first

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[13] Although we hold that the federal district court should have applied the *Strickland* standard, we do not apply the *Strickland* test to the facts of this case or offer any opinion regarding the effectiveness of counsel.

prong of *Strickland* only if the attorney fails to follow his client's express instructions. *Id.* at 478.

The applicability of *Strickland* is even more apparent in the instant case than in *Roe, supra.* In this case, defendant's attorney consulted with defendant and discussed the risks of talking to the police. As in *Roe,* the decision to talk to the police and, thus, to waive the right against compelled self-incrimination and the right to counsel's presence during interrogation, belonged to defendant.[14] Defendant insisted on talking with the police in order to obtain a favorable plea bargain. Thus, the 2000 Court of Appeals panel correctly applied the *Strickland* standard rather than the *Cronic* standard in affirming the trial court's finding after a *Ginther* hearing that defense counsel had not been ineffective.[15] The federal district court erred in holding that defendant was entitled to relief without determining whether defendant was prejudiced by counsel's performance. Accordingly, we vacate the March 2006 published Court of Appeals opinion to the extent that it adopts or approves of the federal district court's decision

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[14] We reject defendant's argument that his waiver of counsel was not knowing and intelligent because it was made on the advice of defense counsel. The 1998 Court of Appeals panel decided that defendant's waiver of counsel was valid. The federal district court's failure to analyze whether defendant's waiver of counsel was valid further illustrates its faulty reasoning in concluding that *Cronic* rather than *Strickland* applies.

[15] This Court denied leave to appeal that decision. 464 Mich. 851 (2001).

endorsing the *Cronic* standard. Because we are bound by the federal district court's ruling on habeas review, we cannot disturb the erroneous ruling of the district court.[16]

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[16] We reject the dissent's argument that we have foreclosed any possibility of holding that the derivative evidence (the street sweepers' testimony) should be excluded by "flatly refus[ing] to accept the validity of the district court's order." *Post* at 6. As we have clearly stated, we recognize that the district court's ruling is binding, and we accept for purposes of this case that defendant's Sixth Amendment rights were violated and that his confession must be excluded. We have scrupulously honored the district court's order, which provides, in pertinent part:

> [T]he only appropriate remedy is to not allow use of [defendant's] tainted statements, should the State decide to initiate a new trial in this matter.
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> * * *
>
> The Court ORDERS that the warden release Petitioner from custody, unless the State of Michigan initiates a new trial in this case, consistent with this Court's Opinion, within one hundred and twenty (120) days from the entry of this Order. [*Frazier v. Berghuis, supra,* slip op. at *7-8.]

The district court did not rule on the admissibility of the street sweepers' testimony. In compliance with the district court's order, we are remanding for a new trial in which defendant's confession must be excluded from evidence. Our disagreement with the district court's ruling regarding the admissibility of defendant's statements in no way affects our ruling regarding the admissibility of the street sweepers' testimony.

IV. APPLICABILITY OF THE EXCLUSIONARY RULE TO THE STREET SWEEPERS' TESTIMONY

We next consider the Court of Appeals ruling that the exclusionary rule applies to the "fruit" of defendant's confession – the testimony of the street sweepers.[17] We conclude that the Court of Appeals erred in holding that the exclusionary rule applies.

The suppression of evidence should be used only as a last resort. *Hudson v. Michigan,* ___U.S.___, 126 S.Ct. 2159, 2163, 165 L.Ed.2d 56 (2006). "[T]he exclusionary rule is 'a harsh remedy designed to sanction and deter police misconduct where it has resulted in a violation of constitutional rights. . . .'" *People v. Anstey,* 476 Mich. 436, 447-448, 719 N.W.2d 579 (2006), quoting *People v. Hawkins,* 468 Mich. 488, 512-513, 668 N.W.2d 602 (2003) (emphasis deleted); see also *Michigan v. Tucker,* 417 U.S. 433, 446, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), quoting *United States v. Calandra,* 414 U.S. 338, 347, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) ("[T]he exclusionary rule's 'prime purpose is to deter future unlawful police conduct. . . .'"). "'The rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect

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[17] "[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'" *Segura v. United States,* 468 U.S. 796, 804, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984) (internal citations omitted).

for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.'" *Id.*, quoting *Elkins v. United States,* 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).[18] The judicially created rule is not designed to act as a personal constitutional right of the aggrieved party. *Calandra, supra* at 348.[19] "[T]he proper focus is on the deterrent effect on law enforcement officers, if any." *People v. Goldston,* 470 Mich. 523, 539, 682 N.W.2d 479 (2004).

"Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe

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[18] While courts must be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for applying the exclusionary rule. *Stone v. Powell,* 428 U.S. 465, 485, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

[19] In *Stone, supra* at 488 n. 24 the United States Supreme Court quoted Professor Anthony Amsterdam:

> "The rule is unsupportable as reparation or compensatory dispensation to the injured criminal; its sole rational justification is the experience of its indispensability in 'exert[ing] general legal pressures to secure obedience to the Fourth Amendment on the part of . . . law-enforcing officers.' As it serves this function, the rule is a needed, but grud[g]ingly taken, medicament; no more should be swallowed than is needed to combat the disease. Granted that so many criminals must go free as will deter the constables from blundering, pursuance of this policy of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest. . . ." Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L.Rev. 378, 388-389 (1964) (footnotes omitted).

the use of illegally seized evidence in all proceedings or against all persons." *Calandra, supra* at 348.

> "The exclusionary rule has its limitations . . . as a tool of judicial control. . . . [In] some contexts the rule is ineffective as a deterrent. . . . Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. . . . [A] rigid and unthinking application of the . . . rule . . . may exact a high toll in human injury and frustration of efforts to prevent crime." *Terry v. Ohio,* [392 U.S. 1, 13-15, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)]. [*People v. Stevens (After Remand),* 460 Mich. 626, 636, 597 N.W.2d 53 (1999).]

"[A]pplication of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served," *Calandra, supra* at 348 "that is, 'where its deterrence benefits outweigh its "substantial social costs,"'" *Hudson, supra* at 2163, quoting *Pennsylvania Bd. of Probation & Parole v. Scott,* 524 U.S. 357, 363, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998), quoting *United States v. Leon,* 468 U.S. 897, 907, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). "Because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs: it undeniably detracts from the truthfinding process and allows many who would otherwise be incarcerated to escape the consequences of their actions." *Scott, supra* at 364. The United States Supreme Court has "repeatedly emphasized that the rule's 'costly toll' upon truth-seeking and law

enforcement objectives presents a high obstacle for those urging application of the rule." *Id.* at 364-365. Because of the costs associated with applying the exclusionary rule, the Court has been cautious against expanding it. *Hudson, supra* at 2163. In determining whether exclusion is proper, a court must "'evaluate the circumstances of [the] case in the light of the policy served by the exclusionary rule. . . .'" *Stevens, supra* at 635, quoting *Brown v. Illinois,* 422 U.S. 590, 604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975).[20]

It cannot be gainsaid that this case presents *no* police misconduct whatsoever. Excluding defendant's confession because of attorney error does not fulfill the goal of the exclusionary rule by deterring the police from future misconduct. *Goldston, supra* at 538.

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[20] The dissent cites *United States v. Wade,* 388 U.S. 218, 240-241, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and *Massiah v. United States,* 377 U.S. 201, 207, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), for the proposition that the exclusionary rule is an appropriate remedy for a Sixth Amendment violation. But those cases do not hold that derivative evidence discovered without any police misconduct whatsoever must be excluded from evidence. In both *Wade* and *Massiah,* the defendant's Sixth Amendment rights were violated because of police misconduct. See *Wade, supra* at 220 (an FBI agent conducted a pretrial lineup [a critical stage of the proceedings] without notice to and in the absence of the defendant's attorney); *Massiah, supra* at 201 (federal agents, without notice to the defendant's attorney, arranged a meeting between the defendant and an accomplice turned informant and eavesdropped on the conversation). No such police misconduct occurred here.

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. [*Tucker, supra* at 447.]

This Court has previously opined that application of the exclusionary rule is inappropriate in the absence of governmental misconduct. See, e.g., *Goldston, supra* at 538 ("[T]he goal of the exclusionary rule would not be furthered where police officers act in objectively reasonable good-faith reliance on a search warrant."); *People v. Elston,* 462 Mich. 751, 764, 614 N.W.2d 595 (2000) ("Because defendant failed to allege or establish a specific discovery violation, or any other sort of prosecutorial misconduct, the trial court lacked a basis upon which to punish the prosecutor by suppressing otherwise admissible evidence."). Moreover, application of the exclusionary rule in these circumstances further encroaches " 'upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.' " *Calandra, supra* at 351 quoting *Alderman v. United States,* 394 U.S. 165, 175, 89 S.Ct. 961, 22 L.Ed.2d

176 (1969). Because the street sweepers' identities were not obtained as a result of any police misconduct, the Court of Appeals erred in applying the exclusionary rule to their testimony.

We agree with Judge Talbot that *Tucker* supports this conclusion. In *Tucker,* the defendant was interrogated before the United States Supreme Court had decided *Miranda, supra,* but the *Miranda* decision nonetheless applied because it had been decided before defendant's trial. During the interrogation, the police did not inform the defendant, as they were required to do after *Miranda,* that counsel would be appointed if the defendant could not afford one. *Id.* at 436. During questioning, the defendant named an alibi witness. *Id.* The witness, rather than confirming the defendant's alibi, discredited his story. *Id.* at 436-437.

The *Tucker* Court held that the exclusionary rule did not apply to the witness's testimony. *Id.* at 452. The Court explained that the police conduct was a departure from later-enacted "prophylactic standards" rather than actual misconduct, so the exclusion of the illegally obtained derivative evidence would not deter future misconduct. *Id.* at 446.[21] The

[21] We reject the dissent's contention that *Tucker* is inapplicable because the *Tucker* defendant's Sixth Amendment rights were not violated. The dissent ignores that the *Tucker* Court based its holding that the exclusionary rule did not apply to the derivative evidence on the narrow ground that the deterrence rationale of the exclusionary rule would not be fulfilled by

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Court also emphasized that the evidence at issue was not a statement by the defendant, but was rather the testimony of a witness whom the police discovered as a result of the defendant's statements, so that "the reliability of [the] testimony was subject to the normal testing process of an adversary trial." *Id.* at 449.

The instant case offers even stronger grounds than *Tucker* against excluding the testimony of the witnesses. Both Tucker and defendant gave statements without counsel present and identified witnesses in their statements. But while Tucker was advised of only some of his rights before waiving his right to counsel, defendant was advised of *all* of his *Miranda* rights before waiving his right to counsel. Tucker did not have counsel present when he waived his right to counsel, while defendant did. There was no police misconduct in either case. In both cases, the confession was suppressed, but in *Tucker,* the witness identified during the confessions was permitted to testify. The same outcome should pertain here. Here, as in *Tucker,* no deterrent purpose would be served by barring the witnesses' testimony. Moreover, the propriety of this outcome is reinforced here, as in *Tucker,* because witnesses were not subjected to custodial pressures, and would be subject to cross-examination.

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excluding the evidence, because the police did not engage in misconduct. *Tucker, supra* at 447-448. We base our holding on the same ground.

Our holding is also supported by *People v. Kusowski,* 403 Mich. 653, 272 N.W.2d 503 (1978). In *Kusowski, supra* at 662, this Court, citing *Ceccolini* and *Tucker,* held that the exclusionary rule does not apply to third-party testimony discovered as a result of a *Miranda* violation. This Court explained that "the interest in preventing future police conduct which violates *Miranda* does not justify depriving the government of use of the evidence." *Kusowski, supra* at 662.

Further, even if defendant's confession had been obtained as a result of police misconduct, we hold that the exclusionary rule would not apply to the street sweepers' testimony. Under the attenuation exception to the exclusionary rule, exclusion is improper when the connection between the illegality and the discovery of the challenged evidence has "'become so attenuated as to dissipate the taint,'" *Wong Sun, supra* at 487, 83 S.Ct. 407 quoting *Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939). Attenuation can occur when the causal connection is remote or when "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." *Hudson, supra* at 2164.

In *Ceccolini, supra* at 276-278 the United States Supreme Court held that the connection between police misconduct and the discovery of witnesses who will testify at trial is often too attenuated to justify application of the exclusionary rule:

The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness. Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet. Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify.

* * *

. . . Rules which disqualify knowledgeable witnesses from testifying at trial are, in the words of Professor McCormick, "serious obstructions to the ascertainment of truth"; accordingly, "[f]or a century the course of legal evolution has been in the direction of sweeping away these obstructions." C. McCormick, Law of Evidence § 71 (1954). [*Ceccolini, supra* at 276-278.]

The *Ceccolini* Court concluded that "since the cost of excluding live-witness testimony often will be greater, a closer, more direct link between the illegality and that kind of testimony is required." *Id.* at 278.

> [T]he exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object. [*Id.* at 280.]

Applying these principles, we conclude that the degree of attenuation was sufficient to dissipate the connection between any Sixth Amendment violation and the testimony. *Ceccolini, supra* at 279. The street sweepers testified of their own free will during the first trial, and any violation of defendant's right to counsel during the interrogation played no meaningful part in the street sweepers' willingness to testify. Moreover, we have no indication that their testimony was, or would be in the next trial, coerced.[22] We

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[22] The dissent argues that the street sweepers' failure to approach the police within one week of the crimes shows that they were not aware of the murders or did not connect the murders with defendant. But this fact actually supports our conclusion that the street sweepers testified of their own free will. In *Ceccolini, supra* at 279 the Court held that the substantial time that elapsed between the illegal search, the police contact with the witness, and the testimony at trial demonstrated that the witness testified of her own free will. We fail to see how the street sweepers' initial ignorance of the murders demonstrates their unwillingness to testify.

conclude, as did the *Ceccolini* Court, that, "[t]he cost of permanently silencing [the third-party testimony] is too great for an evenhanded system of law enforcement to bear in order to secure such a speculative and very likely negligible deterrent effect." *Ceccolini, supra* at 280. Because of the remote causal connection between any Sixth Amendment violation and the discovery of the street sweepers' identities, there is no justification for suppression of the street sweepers' testimony.[23]

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[23] The dissent argues,

> In contrast to the situation in *Ceccolini,* the identities of the street sweepers were not known to the investigators, nor were they likely to be uncovered in the course of the police investigation. . . . [I]t appears that the relationship between the identity of the street sweepers and defendant's illegal interrogation is not attenuated because the identities were revealed as a direct result of defendant's interrogation. [*Post* at 13.]

But *Ceccolini, supra* at 277 holds: " 'The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give.' " (Citation omitted.) The attenuation exception to the exclusionary rule, unlike the inevitable discovery exception, does not focus primarily on the likelihood of discovering a live witness. Rather, *Ceccolini* holds that the attenuation exception applies when the connection between police misconduct and the discovery of witnesses who will testify at trial is too attenuated to justify application of the exclusionary rule. Attenuation can occur when the causal connection is remote or when "the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence

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In sum, the Court of Appeals erred in holding that the exclusionary rule applies to the street sweepers' testimony. Law enforcement did not engage in any misconduct in obtaining defendant's confession or discovering the identity of the street sweepers, so the goal of the exclusionary rule would not be served by excluding the street sweepers' testimony. In any case, the degree of attenuation between the street sweepers' testimony and any violation of defendant's Sixth Amendment rights is sufficient to dissipate any taint.[24]

V. CONCLUSION

We reverse the Court of Appeals holding that the exclusionary rule applies to the street sweepers' testimony. We further vacate the Court of Appeals endorsement of the federal district court's *Cronic*

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obtained." *Hudson, supra* at 2164. Here, the attenuation exception applies because the illegality played no meaningful role in the street sweepers' decision to testify, and the costs of excluding the street sweepers' testimony would outweigh the interests served by its suppression.

[24] The dissent argues that it is questionable whether the identities of the street sweepers would inevitably have been discovered during the course of the police investigation. We agree. But the inevitable discovery doctrine is an *exception* to application of the exclusionary rule. *Stevens, supra* at 636. Because the exclusionary rule does not apply to the street sweepers' testimony, the inevitable discovery exception is also inapplicable.

analysis. We remand for further proceedings consistent with this opinion.

Maura D. Corrigan
Clifford W. Taylor
Elizabeth A. Weaver
Robert P. Young, Jr.
Stephen J. Markman

CAVANAGH, J. (*dissenting*).

I respectfully dissent from today's decision. In this case, we are called to implement a federal district court's order stemming from defendant's petition for a writ of habeas corpus. Rather than genuinely attempting to execute the federal court's order in our courts, the majority disputes the basis of the order itself and, as a result, frustrates its intended effect.

From the outset, the majority needlessly criticizes the federal district court's legal analysis. We are bound by the district court's holding that defendant's incarceration violated the United States Constitution because the interrogation of defendant violated his Sixth Amendment rights. We are equally bound to enforce the remedy the district court ordered – the exclusion of defendant's confession from any retrial. A judgment in a habeas corpus proceeding is res judicata with regard to the issues of law and fact necessary to reach the conclusion that the prisoner was illegally in custody. *Collins v. Loisel,* 262 U.S. 426, 430, 43 S.Ct. 618, 67 L.Ed. 1062 (1923). A state

supreme court "may not . . . re-examine and decide a question which has been finally determined by a court of competent jurisdiction in earlier litigation between the parties." *City of Tacoma v. Taxpayers of Tacoma,* 357 U.S. 320, 334, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958).

Aside from the constraints of res judicata, the federal district court's enforcement power prevents us from deviating from its conditional grant of defendant's petition for a writ of habeas corpus. When conditionally granting a writ of habeas corpus, a federal district court retains jurisdiction to determine whether a party has complied with the terms of its order. *Gentry v. Deuth,* 456 F.3d 687, 692 (C.A.6, 2006). A state's failure to timely cure the error identified by a federal district court in its order justifies the release of the prisoner. *Id.* Accordingly, unless defendant's trial comports with the federal district court's order, he should be released from custody.

Because we are bound to follow the federal district court's order, any statements adopting or disavowing the basis of the order are inconsequential; they cannot influence any decision before us.[25] The majority's disavowal and criticism of the district court's application of *United States v. Cronic,* 466 U.S.

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[25] The majority suggests that these issues may be raised on appeal if defendant is convicted. But the federal district court order will always bind this particular case because the prosecution failed to appeal the ruling.

648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), are mere dicta. "[S]tatements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication." *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 597-598, 374 N.W.2d 905 (1985) (citation omitted). Similarly, the Court of Appeals endorsement of the district court's ruling was also dicta and could have simply been vacated as such.[26] But unlike the Court of Appeals dicta, the majority's dicta is an obstacle to our task – implementing the district court's order in state court proceedings. By questioning the validity of the district court's order excluding defendant's confession from the outset, the majority effectively eliminates the possibility of excluding evidence derived from the confession – the very matter we are called upon to decide.

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[26] The majority characterizes its discussion of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Cronic* as an explanation of its reasoning. But the majority could have explained why the Court of Appeals statements are dicta without passing judgment on the underlying analysis. "It is not our duty to pass on moot questions or abstract propositions." *Sullivan v. State Bd. of Dentistry*, 268 Mich. 427, 429, 256 N.W. 471 (1934). I would exercise judicial restraint and reserve such in-depth analysis for a case that properly presents the issue for our review.

I. THE EXCLUSIONARY RULE IN SIXTH AMENDMENT CASES

We are presented with the question whether, when a confession has been obtained in violation of a defendant's Sixth Amendment rights but without police misconduct, the exclusionary rule applies to live-witness testimony that is derived from the tainted confession. The exclusionary rule has long been employed as a remedy for violations of the Sixth Amendment right to counsel. *United States v. Wade,* 388 U.S. 218, 240-241, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *Massiah v. United States,* 377 U.S. 201, 207, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). "Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison,* 449 U.S. 361, 364, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981).

> [W]hen before trial but after the institution of adversary proceedings, the prosecution has improperly obtained incriminating information from the defendant in the absence of his counsel, the remedy characteristically imposed is not to dismiss the indictment but to suppress the evidence or to order a new trial if the evidence has been wrongfully admitted and the defendant convicted. [*Id.* at 365.]

The nature of a Sixth Amendment violation supports the use of the exclusionary rule even when

the violation occurs because of defense counsel's ineffectiveness or absence rather than government misconduct. "[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington,* 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic, supra* at 658.

The rule distilled from federal authority is that the remedy for Sixth Amendment violations should be tailored to the circumstances to assure the defendant a fair trial. *Morrison, supra* at 364. In fashioning an appropriate remedy, the federal approach has been "to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.* at 365. In this case, the federal district court ruled that "the only appropriate remedy is to not allow use of [defendant's] tainted statements, should the State decide to initiate a new trial in this matter." *Frazier v. Berghuis,* unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 6, 2003 (Docket No. 02-CV-71741DT), slip op. at 7. The district court recognized that the only proper remedy that would afford defendant a fair trial, while not entirely foreclosing the state's ability to prosecute defendant, was to apply the exclusionary rule to defendant's statements.

The majority contends that an application of the exclusionary rule is inappropriate in the absence of governmental misconduct. *Ante* at 20. But as I noted in *People v. Goldston,* 470 Mich. 523, 562, 682 N.W.2d 479 (2004) (Cavanagh, J., dissenting), deterrence of governmental misconduct is not the *sole* purpose of the exclusionary rule. The exclusionary rule also ensures the integrity of judicial proceedings, *Terry v. Ohio,* 392 U.S. 1, 12-13, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), and closes the courthouse doors "to any use of evidence unconstitutionally obtained. . . ." *Wong Sun v. United States,* 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). The district court never indicated that its ruling was calculated to remedy improper conduct by law enforcement officials; rather, it was a response tailored to the fact of the Sixth Amendment violation itself. It would impair the integrity of our judicial system if defendant's statements could be introduced against him, despite a binding federal ruling that they had been obtained in violation of his Sixth Amendment rights.

The exclusionary rule was applied here to afford defendant a fair trial, not to deter governmental misconduct, but the majority still reasons that the exclusionary rule should not apply to the evidence derived from defendant's confession because no governmental misconduct occurred.[27] *Ante* at 20. But

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[27] I do not dispute that there was no evidence of police misconduct in this case. But as I have stated here and on other

(Continued on following page)

this fails to address the pertinent issue in applying the district court's order – whether excluding the derivative evidence will "neutralize the taint" caused by the interrogation and provide defendant "the effective assistance of counsel and a fair trial." *Morrison, supra* at 365. Further, it follows that the majority holds that the derivative evidence should not be excluded, when the majority flatly refuses to accept the validity of the district court's order. If the majority does not agree, and cannot accept for the purposes of this case, that defendant's interrogation constituted a Sixth Amendment violation that can be remedied by applying the exclusionary rule, it is not surprising that the majority finds no basis for excluding the evidence derived from that interrogation.[28]

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occasions, I disagree that the exclusionary rule is an appropriate remedy only when government misconduct has occurred.

[28] While the underlying Sixth Amendment violation is not a question that is properly before us, because of the majority's extensive review of the matter, I find it appropriate to briefly rebut its account. Ample evidence supports the federal district court's ruling. The defect in defense counsel's performance was not merely advising his client to speak to the police despite being told that no plea agreements were being offered; counsel's advice also prompted defendant to waive his right to have counsel present at the interrogation. Notably, at the hearing conducted pursuant to *People v. Ginther*, 390 Mich. 436, 212 N.W.2d 922 (1973), defense counsel was asked why he was not present during any of defendant's interrogations. He responded, "I don't know that they, one, they would have allowed me to be in there." The validity of defendant's waiver of counsel is seriously questionable when he was receiving advice from an attorney who believed that his presence at his client's postindictment interrogation was subject to approval by the police.

The exclusion of derivative evidence is premised entirely on the existence of illegally obtained *primary evidence.* By rejecting the premise that the primary evidence should be excluded, the majority forecloses any possibility of holding that the derivative evidence should also be excluded.

II. DERIVATIVE EVIDENCE

Given that defendant's statement must be excluded from evidence, this Court is presented with the question whether evidence derived from defendant's interrogations, namely, the testimony of two street sweepers whom defendant identified during his conversations with the police, should also be excluded. In deciding whether derivative evidence is admissible, the relevant inquiry is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Wong Sun, supra* at 488 quoting Maguire, Evidence of Guilt, p. 221 (1959). Derivative evidence may be admissible if the connection between the illegality and the evidence was "'so attenuated as to dissipate the taint.'" *Wong Sun, supra* at 491 quoting *Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939). For example, *Wong Sun* presented a situation where the defendant was illegally arrested, but lawfully arraigned and released on his own recognizance, and voluntarily returned to the authorities several days

later to make a statement, and the statement was deemed sufficiently attenuated from the illegal arrest that it was deemed admissible. *Id.* In this case, defendant disclosed the identities of the street sweepers, Anthony Wright and Wilbert Mack, during a postarraignment interrogation outside the presence of counsel. Defendant told officers that Wright and Mack gave him a ride home after the robbery. The prosecution located these witnesses, and they testified against defendant at his trial, stating that he had asked them for a ride home and sought change for a $50 bill. Defendant had also admitted to officers that codefendant Idell Cleveland gave him two $50 bills following the robbery.

Under the attenuation test of *Wong Sun,* the testimony of Wright and Mack should be excluded from evidence. Their identities were discovered as a direct result of the tainted interrogation. There was no intervening act of free will that dissipated the taint of the Sixth Amendment violation. The majority argues that *Michigan v. Tucker,* 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), supports the opposite conclusion, but that case is inapplicable. In *Tucker,* the Court held that derivative witnesses could testify although the defendant's own statement had been suppressed because it had been obtained after deficient *Miranda*[29] warnings. *Id.* at 436-437, 450. Notably, from the outset, the *Tucker* opinion

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[29] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

distinguished Sixth Amendment violations from the case before it:

> [Defendant] did not, and does not now, base his arguments for relief on a right to counsel under the Sixth and Fourteenth Amendments. Nor was the right to counsel, as such, considered to be persuasive by either federal court below. We do not have a situation such as that presented in *Escobedo v. Illinois,* 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977 (1964)], where the policemen interrogating the suspect had refused his repeated requests to see his lawyer who was then present at the police station. [*Tucker, supra* at 438.]

Similarly, *Tucker* also distinguished *Wong Sun*:

> But we have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege. [*Id.* at 445-446.]

In sum, *Tucker* made very clear that its holding was based on the condition that there was no constitutional violation, but merely a violation of what it perceived as a procedural safeguard designed to protect the constitutional right against self-incrimination. Because the present case involves a constitutional violation, defendant's case is more analogous to *Wong Sun* than to *Tucker.*

But analysis under the rule of *Wong Sun* does not resolve the inquiry because in this case the derivative evidence is live-witness testimony, which requires special consideration. "[T]he exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and the discovery of a live witness than when a similar claim is advanced to support suppression of an inanimate object." *United States v. Ceccolini,* 435 U.S. 268, 280, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978). Accordingly, in making its suppression decision, a court should take into account the unique factors presented by a live witness. For example, "[t]he greater the willingness of the witness to freely testify, the greater the likelihood that he or she [would have been] discovered by legal means. . . ." *Id.* at 276. Also, "the cost of excluding live-witness testimony" is often greater than the cost of excluding inanimate evidence, so a "more direct link between the illegality and that kind of testimony is required." *Id.* at 278.

Of course, *Ceccolini* does not stand for the proposition that live-witness testimony should never be excluded. It simply requires the court, when deciding whether discovery of the evidence is attenuated from the illegality, to scrutinize different factors than those in cases involving the exclusion of physical evidence. The court's attenuation analysis should be "appropriately concerned with the differences between live-witness testimony and inanimate evidence. . . ." *Id.* at 278-279.

The first factor in live-witness cases considers the free will of a live witness. In part, it is related to the inevitable discovery doctrine, an exception to the exclusionary rule that allows the admission of illegally obtained evidence if the evidence would inevitably have been obtained through legal means.[30] *Nix v. Williams,* 467 U.S. 431, 443, 104 S.Ct. 2501, 81

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[30] While *Ceccolini* does not hold that the discovery of a live witness may *only* be attenuated if that witness would have been inevitably discovered, the likelihood of discovering a live witness remains a significant factor. *Ceccolini* itself evokes the inevitable discovery doctrine when it notes that "[t]he greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be *discovered by legal means,*" *Ceccolini, supra* at 276 (emphasis added), and that "a determination that the *discovery* of certain evidence is sufficiently . . . independent of the constitutional violation to permit its introduction at trial is not a determination which rests on the comparative reliability of that evidence," *id.* at 278 (emphasis added). In applying the live-witness factors to Ceccolini's case, the Court observed that "both the identity of [the witness] and her relationship with the respondent were well known to those investigating the case," *id.* at 279 suggesting that the witness's identity would have been discovered regardless of the illegality. Further, Justice Marshall recognized in his dissent that the *Ceccolini* factors bore resemblance to the inevitable discovery doctrine when he stated:

> [T]he Court's approach involves a form of judicial "double counting." The Court would apparently first determine whether the evidence stemmed from an independent source or would inevitably have been discovered; if neither of these rules was found to apply, as here, the Court would still somehow take into account the fact that, as a general proposition (but not in the particular case), witnesses sometimes do come forward of their own volition. [*Id.* at 287-288 (Marshall, J., dissenting).]

L.Ed.2d 377 (1984). The nature of live witnesses is that, unlike inanimate objects, they can approach the police voluntarily. But between the time of the murders and defendant's confessions, approximately one week, Wright and Mack did not approach the police with information about defendant. This indicates that they did not connect defendant with the crime or were not aware of the murders. Also relevant to the degree of free will exercised by a witness is whether the illegality played any meaningful part in the witness's willingness to testify. There is no indication that defendant's illegal interrogation influenced Wright and Mack's decision to testify. In sum, the application of the first *Ceccolini* factor gives mixed results that require balancing by the trial court.

The remaining live-witness factors balance the costs of excluding a live witness with the illegality. Live-witness testimony requires a closer connection to the illegality because "such exclusion would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby." *Ceccolini, supra* at 277. But this factor is most relevant when the discovery of the live witness is incidental to the illegality. For example, in *Ceccolini,* a police officer discovered in an envelope evidence of a gambling operation while casually visiting with a store clerk. When the officer asked the clerk whom the envelope belonged to, the clerk identified Ceccolini, the defendant. At Ceccolini's trial, both

the contents of the envelope and the clerk's testimony were suppressed on the basis that an illegal search had occurred. The United States Supreme Court reversed, stating that "[w]hile the particular knowledge to which [the clerk] testified at trial can be logically traced back to [the officer's] discovery of the policy slips, both the identity of [the clerk] and her relationship with the [defendant] were well known to those investigating the case." *Id.* at 279.

In contrast to the situation in *Ceccolini,* the identities of the street sweepers were not known to investigators, nor were they likely to be uncovered in the course of the police investigation. Wright and Mack were strangers to defendant, so the police would have had no reason to interview them as his associates. While it is possible that the prosecution may be able to demonstrate to the contrary, it appears that the relationship between discovering the identities of the street sweepers and defendant's illegal interrogation is not attenuated because the identities were revealed as a direct result of defendant's interrogation.

The Court of Appeals was correct to remand this case to the trial court to consider the *Ceccolini* factors and determine whether the testimony of Wright and Mack would otherwise be admissible under the inevitable discovery doctrine. Because of the trial court's initial ruling, the question whether the identities of the street sweepers would have been inevitably discovered was never addressed. Consequently, the prosecution should be given the opportunity to show

that Wright and Mack would have been discovered regardless of defendant's interrogation without counsel. Accordingly, I would affirm the decision of the Court of Appeals.

Michael F. Cavanah
Marilyn Kelly

People v. Frazier, COA 256986

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v. COREY RAMONE FRAZIER, Defendant-Appellee.	FOR PUBLICATION March 7, 2006 9:00 a.m. No. 256986 Genesee Circuit Court LC No. 95-052613-FC Official Reported Version

Before: COOPER, P.J., and TALBOT and FORT HOOD, JJ.

COOPER, P.J.

The prosecution appeals, by leave granted, the July 28, 2004, order of the trial court granting defendant's pretrial motions to exclude certain evidence during his new trial. Specifically, the court prohibited the prosecution from using for impeachment purposes statements made by defendant should defendant waive his Fifth Amendment privilege and take the stand in his own defense. The United States District Court for the Eastern District of Michigan previously found that these statements were elicited in violation

of defendant's Sixth Amendment right to counsel.[1] The trial court also prohibited the prosecution from presenting the testimony of two witnesses whose identity was procured from those inadmissible statements, absent a showing that these witnesses were, in fact, discovered from an independent source. We affirm in part and reverse in part.

I. Factual and Procedural Background

In 1996, defendant was convicted following a jury trial of two counts of felony murder,[2] two counts of possession of a firearm during the commission of a felony (felony-firearm),[3] and one count of armed robbery.[4] Defendant's convictions arose from the 1995 murders of James Goff and Aaron McColgan. Kenneth Haywood implicated defendant in the crime. Mr. Haywood told investigating officers that he drove defendant and codefendant, Idell Cleveland,[5] to Mr. McColgan's home on the night of the murders. Mr. Haywood waited in his car while defendant and Mr.

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[1] After defendant exhausted his state appellate relief, he successfully petitioned the federal district court for a writ of habeas corpus.

[2] MCL 750.316.

[3] MCL 750.227b.

[4] MCL 750.529.

[5] This Court affirmed Mr. Cleveland's convictions of two counts of first-degree murder, MCL 750.316; two counts of felony-firearm, MCL 750.227b; and one count of armed robbery, MCL 750.529. *People v. Cleveland*, unpublished opinion of the Court of Appeals, issued June 17, 1997 (Docket No. 194236).

Cleveland went inside. Through the open windows of the house, Mr. Haywood heard Mr. Cleveland say, "Get on the floor." Mr. Haywood then heard two gunshots, whereupon he fled the scene alone. He went to the police station the following day, after reading of the murders in a local newspaper.

Based on the information provided by Mr. Haywood, officers executed a search warrant at defendant's home three days after the murders. Thereafter, defendant's mother retained an attorney to represent her son. The attorney advised defendant to speak with the police in an attempt to negotiate a plea bargain, and accompanied his client when he surrendered to the authorities. Two days later, and following his arraignment, defendant gave three statements to the police detailing his involvement in the crime. Although initially denying any knowledge of Mr. Cleveland's plans, defendant ultimately admitted that he knew that Mr. Cleveland was armed and intended to rob Mr. Goff and Mr. McColgan.[6] Defendant also admitted that Mr. Cleveland gave him two

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[6] A panel of this Court previously indicated that "defendant admitted that he supplied codefendant with the murder weapon and knew of codefendant's intent to rob the victims." *People v. Frazier (After Remand)*, unpublished opinion of the Court of Appeals, issued April 21, 2000 (Docket No. 193891) (*Frazier III*), slip op. at 6 n. 2. This description of defendant's statement is inaccurate. Defendant stated that he knew that Mr. Cleveland intended to rob Mr. Goff and Mr. McColgan "when he told me to get his gun." Defendant never indicated that he provided the murder weapon.

$50 bills following the robbery. Defendant told officers that two men operating a street sweeper gave him a ride home following the shootings. The prosecution located these witnesses, Anthony Wright and Wilbert Mack, who testified that defendant indicated that he had been at a party and could not find a ride home. They further testified that defendant asked them if they had change for a $50 bill.

In his first appeal, defendant alleged that counsel was ineffective for advising him to speak to the police absent an official offer to enter into a plea agreement. This Court originally affirmed defendant's convictions.[7] Upon receiving information from the defendant that the challenged interrogations occurred following arraignment, however, the panel reconsidered and remanded for a *Ginther*[8] hearing.[9] At that hearing, defense counsel testified that he remained with defendant while he waived his *Miranda*[10] rights and agreed to speak with the police. However, counsel admitted that he did not accompany his client into the interrogations, as he was uncertain whether the

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[7] *People v. Frazier*, unpublished opinion of the Court of Appeals, issued February 27, 1998 (Docket No. 193891) (*Frazier I*) (vacated by an order entered May 6, 1998).

[8] *People v. Ginther*, 390 Mich. 436, 212 N.W.2d 922 (1973).

[9] *People v. Frazier (On Rehearing)*, unpublished opinion of the Court of the Appeals, issued August 7, 1998 (Docket No. 193891) (*Frazier II*). The panel also vacated defendant's conviction of armed robbery on double jeopardy grounds.

[10] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

officers would have allowed him to be present. Despite counsel's abandonment of his client, the trial court denied defendant's motion for a new trial and this Court affirmed.[11] Defendant then filed an application for leave to appeal with the Michigan Supreme Court, which was denied.[12]

The defendant subsequently filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. Defendant alleged for the first time in that petition that defense counsel's abandonment during the police interrogations violated his Sixth Amendment right to counsel under *United States v. Cronic*.[13] The federal district court agreed and granted defendant's writ.[14] The district court found that defendant was completely deprived of the assistance of counsel during a critical stage of the proceedings – the police interrogations following his arraignment.[15] Accordingly, the district court found:

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[11] *Frazier III, supra*. The panel focused solely on counsel's strategic decision to seek a plea bargain for his client.

[12] *People v. Frazier*, 464 Mich. 851 (2001) (*Frazier IV*) (Kelly and Cavanagh, JJ., dissenting).

[13] *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

[14] *Frazier v. Berghius*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued August 6, 2003 (Docket No. 02-CV-71741-DT) (*Frazier V*).

[15] *Id.* at 12-13.

> The absence of counsel during the interrogations tainted the whole trial process, as evidenced by the use of Petitioner's statements at trial. Allowing the State to retry Petitioner with the use of the statements made during the tainted interrogations would lead only to yet another tainted trial. Therefore, the only appropriate remedy is to not allow use of the tainted statements, should the State decide to initiate a new trial in this matter.[16]

Thereafter, the prosecution re-arraigned defendant in November of 2003.[17] Prior to trial, defendant filed a motion to prevent the prosecution from making *any* use of his statements to the police, even for impeachment purposes. Defendant also sought to prevent the prosecution from introducing the testimony of Mr. Wright and Mr. Mack, as knowledge of their identity was only procured from defendant's inadmissible statements. The trial court excluded both the statements and any evidence derived therefrom.[18] Based solely on the federal district court's order, the trial court determined that allowing the prosecution to use the statements for impeachment

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[16] *Id.* at 13-14.

[17] In the current trial, the prosecution charged defendant with two counts of open murder (rather than felony murder), MCL 750.316; two counts of felony-firearm, MCL 750.227b; and one count of armed robbery, MCL 750.529.

[18] The trial court also ruled upon several pretrial, evidentiary motions that are not at issue in this appeal.

purposes would taint defendant's retrial. The trial court also granted defendant's motion to exclude the testimony of Mr. Mack and Mr. Wright as "fruits" of those improper statements. The court noted, however, that these witnesses could be called at trial, "if the People can provide a foundation that the discovery of these witnesses came from a different source." This Court subsequently granted the prosecution's motion for leave to appeal.[19]

II. Impeachment

The prosecution first contends that the trial court improperly excluded the use of defendant's statements for impeachment purposes in the event that defendant waives his Fifth Amendment privilege against self-incrimination and takes the stand in his own defense. We review a trial court's decision to admit or exclude evidence for an abuse of discretion.[20] However, when the trial court's decision involves a preliminary question of law, we review the issue de novo.[21]

We agree with the federal district court's determination that the prosecution is prohibited from using defendant's statements elicited during the

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[19] *People v. Frazier*, unpublished order of the Court of Appeals, entered July 30, 2004 (Docket No. 256986).

[20] *People v. Lukity*, 460 Mich. 484, 488, 596 N.W.2d 607 (1999).

[21] *Id.*

post-arraignment interrogations in its case-in-chief. "The Sixth Amendment provides that the accused in a criminal prosecution 'shall enjoy the right . . . to have the Assistance of counsel for his defence.'"[22] The accused is guaranteed "the right to rely on counsel as a 'medium' between him and the State."[23] This right attaches once formal adversary proceedings are initiated against the defendant, such as at arraignment.[24] Generally, a defendant who alleges that he was denied the effective assistance of counsel must establish that counsel's errors affected the outcome of his trial.[25] However, the complete deprivation of the assistance of counsel at a critical stage of the adversary proceedings amounts to structural error, and, therefore, prejudice is presumed.[26] The United States Supreme Court has repeatedly found that post-arraignment police interrogations are a critical stage

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[22] *People v. Russell*, 471 Mich. 182, 187, 684 N.W.2d 745 (2004), quoting U.S. Const., Am. VI. See also Const. 1963, art. 1, § 20 (a criminal defendant "shall have the right . . . to have the assistance of counsel for his . . . defense").

[23] *Maine v. Moulton*, 474 U.S. 159, 176, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985).

[24] *Michigan v. Jackson*, 475 U.S. 625, 629-630, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972).

[25] *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[26] *Cronic, supra* at 659; *People v. Willing*, 267 Mich.App. 208, 224 (2005), citing *Russell, supra* at 194 n. 29, and *People v. Anderson (After Remand)*, 446 Mich. 392, 405, 521 N.W.2d 538 (1994).

of criminal proceedings at which a defendant is entitled to legal representation.[27] Yet, defense counsel, in this case, purposefully and unreasonably left his client to face the police interrogations alone. The prosecution did not overcome the strong presumption that defendant's subsequent waiver of his right to counsel was invalid. Accordingly, the prosecution clearly may not use defendant's statements in its case-in-chief.[28]

While the United States Supreme Court has repeatedly excluded statements elicited in violation of a defendant's constitutional rights from the prosecution's case-in-chief, such statements, if otherwise voluntary, are admissible for impeachment purposes. In *Walder v. United States,*[29] the Supreme Court found that the prosecution may not rely on evidence seized in violation of the Fourth Amendment to establish a defendant's guilt. Yet, the Court found no

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[27] *Jackson, supra* at 629-630; *Brewer v. Williams,* 430 U.S. 387, 400-401, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), citing *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

[28] See *Michigan v. Harvey,* 494 U.S. 344, 349, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990), citing *Jackson, supra* ("[O]nce a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right – even if voluntary, knowing, and intelligent under traditional standards-is presumed invalid if secured pursuant to police – initiated conversation," and may not be admitted as substantive evidence in the prosecutor's case-in-chief.).

[29] *Walder v. United States,* 347 U.S. 62, 64-65, 74 S.Ct. 354, 98 L.Ed. 503 (1954).

reason to exclude such evidence for impeachment purposes.

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. . . .
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> . . . Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.[30]

The United States Supreme Court has similarly found that statements improperly elicited during a custodial interrogation after a defendant invokes the

[30] *Id.* at 65.

right to counsel may be used for impeachment purposes.[31]

> Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. . . .
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> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.[32]

More recently, in *Michigan v. Harvey,*[33] the United States Supreme Court specifically determined that statements improperly elicited in violation of a defendant's Sixth Amendment right to counsel could be used to impeach his or her testimony on the stand.

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[31] *Oregon v. Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). We note that previous opinions of the Supreme Court appeared to consider *Miranda* to be merely a "prophylactic" protection of a defendant's Fifth Amendment rights. The Supreme Court has since made clear that the protections in *Miranda* are themselves constitutionally based. *Dickerson v. United States,* 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

[32] *Harris, supra* at 225-226.

[33] *Harvey, supra.*

The Court acknowledged that, as waivers of a defendant's Sixth Amendment right to counsel are presumptively invalid, evidence obtained following such a waiver is inadmissible to establish a defendant's guilt.[34] "The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections. But use of statements so obtained for impeachment purposes is a different matter."[35] The Court reasoned that the exclusion of "reliable and probative evidence for *all* purposes" was only necessary when "derived from *involuntary* statements."[36]

Nothing on the record suggests that defendant's statements during these post-arraignment interrogations were involuntary. This Court has found that "[a] confession is involuntary if obtained by any sort of threat or violence, by any promises, express or implied, or by the exertion of any improper influence."[37]

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[34] *Id.* at 349.

[35] *Id.* at 351.

[36] *Id.*, citing *New Jersey v. Portash*, 440 U.S. 450, 459, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979). See also *People v. Stacy*, 193 Mich.App. 19, 24-25, 484 N.W.2d 675 (1992), quoting *People v. Paintman*, 139 Mich.App. 161, 169-170, 361 N.W.2d 755 (1984) ("'[S]tatements taken in violation of a defendant's right to counsel, if voluntary, may be used for impeachment purposes although they could not have been used in the prosecutor's case-in-chief.'").

[37] *Paintman, supra* at 171, citing *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

The United States Supreme Court has further found "that coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause. . . ."[38] Defendant was advised of his *Miranda* rights in the presence of counsel and signed a waiver form. Defendant does not contend, nor is there any indication on the record, that any police officer intimidated, coerced, or used any other improper method to secure defendant's statements.[39] Neither the caselaw of this state,[40] nor that from the United States Supreme Court, requires the total exclusion of otherwise voluntary statements elicited in violation of a defendant's Sixth Amendment right to counsel. The exclusion of these statements for impeachment purposes

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[38] *Colorado v. Connelly,* 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

[39] See *Frazier II, supra* at 4-5. The panel in that case found that a detective mistakenly informed defendant that any statements made during his polygraph examination would be inadmissible in court. However, officers corrected that error prior to administering the exam. *Id.* at 5.

[40] We note that, prior to *Michigan v. Harvey,* the Michigan Supreme Court had not made a definitive decision whether the prosecution could impeach a defendant with his prior inconsistent statements elicited in violation of his right to counsel. See *People v. Esters,* 417 Mich. 34, 331 N.W.2d 211 (1982) (in which three justices found that such statements could be used for impeachment purposes, while three others would prohibit the use of the statements for any purpose). See also *People v. Gonyea,* 421 Mich. 462, 365 N.W.2d 136 (1984) (the justices reached a similar three-three split, with Justice Cavanagh finding that the statement was inadmissible for any purpose under the facts of that case alone).

was unwarranted under these circumstances. Accordingly, we reverse that part of the trial court's order granting defendant's motion on this ground.

III. Derivative Evidence

The trial court also determined that the prosecution was precluded from introducing the testimony of Mr. Mack and of Mr. Wright, as their identities were discovered during the improper post-arraignment interrogations. However, the court ruled that the prosecution could present these witnesses if it could establish that it did, *in fact,* discover their identities from an independent source. Rather than making that determination during the motion hearing, the trial court left the prosecution to its proofs. We agree that the prosecution must make an affirmative showing to support the admission of this evidence prior to calling these witnesses. Yet, we do not agree that the prosecution must show that it *actually* discovered these witnesses through independent, legal means. Rather, the prosecution need only show that the identity of these witnesses would have inevitably been discovered through alternate means.[41]

The rule that the tainted "fruit" of unlawful government conduct must be suppressed began with the United States Supreme Court's opinion in

[41] We further believe that the trial court must make this determination at a separate hearing outside the presence of the jury.

Silverthorne Lumber Co. v. United States.[42] The exclusionary rule originally applied to tangible evidence obtained in violation of the Fourth Amendment and any incriminating evidence derived therefrom.[43] In *Wong Sun v. United States,* the Supreme Court extended the rule to further exclude indirect evidence derived from an illegal search.[44] From the genesis of the exclusionary rule, however, there were exceptions. Illegally obtained evidence does not "become sacred and inaccessible"; rather, these facts, if discovered by independent means, can be placed before the jury as substantive evidence.[45] In *Wong Sun,* the Court noted the lessened need for exclusion when the connection between the illegally seized evidence and the underlying impropriety was attenuated.

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made

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[42] *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920).

[43] *Id.* at 392.

[44] *Wong Sun v. United States,* 371 U.S. 471, 484-485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

[45] *Silverthorne, supra* at 392. See also *United States v. Ceccolini,* 435 U.S. 268, 274, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978), quoting *Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939).

> has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[46]

This exception to the exclusionary rule is known as the "independent source doctrine."

The United States Supreme Court has not limited the application of the exclusionary rule, or its exceptions, to violations of a defendant's Fourth Amendment right to be free from illegal searches and seizures. The Court has since applied the rule to violations of a defendant's Sixth Amendment right to counsel[47] and Fifth Amendment privilege against self-incrimination.[48] In *Michigan v.*

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[46] *Wong Sun, supra* at 487-488, quoting Maguire, Evidence of Guilt, 221 (1959).

[47] See *United States v. Wade,* 388 U.S. 218, 227, 240-241, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (holding that an identification based upon a pretrial lineup, conducted without the benefit of counsel, must be suppressed unless the prosecution can establish that a witness's in-court identification was based upon independent observations).

[48] See *Kastigar v. United States,* 406 U.S. 441, 460-461, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972) (holding that evidence obtained in violation of a defendant's Fifth Amendment privilege against self-incrimination must be suppressed unless the prosecution can establish that it "had an independent, legiti mate source for the disputed evidence"). See also *Murphy v. Waterfront Comm. of New York Harbor,* 378 U.S. 52, 79, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), overruled in part on other grounds *United States v. Balsys,* 524 U.S. 666, 118 S.Ct. 2218, 141 L.Ed.2d 575 (1998).

Tucker,[49] however, the Supreme Court declined to extend the exclusionary rule to statements procured in violation of a defendant's right to counsel during a custodial interrogation. In *Tucker,* the defendant was advised that he had the right to counsel during his custodial interrogation, but was not advised that counsel could be appointed.[50] The Court found that the defendant voluntarily spoke with the police, regardless of the imperfect instruction of rights.[51] During the interrogation, the defendant named an alibi witness, who ultimately further incriminated the defendant.[52] The Court found the exclusionary rule of *Wong Sun* inapplicable in cases involving a violation of *Miranda's* "prophylactic" protection of a defendant's Fifth Amendment rights.[53] The Court did exclude the defendant's statements from the prosecution's case-in-chief, however, the Court determined that, where officers act in good faith, the exclusion of illegally obtained evidence would not deter future misconduct.[54] The Court further declined to exclude

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[49] *Michigan v. Tucker,* 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974).

[50] *Id.* at 435. Defendant was arrested and interrogated before the United States Supreme Court issued its opinion in *Miranda v. Arizona.* However, his trial occurred after that decision.

[51] *Id.* at 450.

[52] *Id.* at 436-437.

[53] *Id.* at 444. The Court has not extended the exclusionary rule to such situations since rendering its opinion in *Dickerson, supra.*

[54] *Tucker, supra* at 447-448.

the testimony of the defendant's "alibi" witness, as that witness was not subjected to "custodial pressures."[55] Accordingly, the Court found that his independent testimony was trustworthy and therefore admissible against the defendant.[56]

Tucker is inapplicable in this case, however, as defendant was clearly deprived of his Sixth Amendment right to counsel following the initiation of formal adversary proceedings. Therefore, pursuant to *Silverthorne* and *Wong Sun,* the prosecution may not present the testimony of Mr. Mack and Mr. Wright absent an exception to the exclusionary rule. While the prosecution is not required to show that it did, *in fact,* discover these witnesses through independent means, the prosecution must show that their independent discovery was inevitable.

In *United States v. Ceccolini,* the Supreme Court noted that it would invoke the exclusionary rule "with much greater reluctance" where the illegally obtained, derivative evidence was live testimony.[57] The Court did not name the doctrine upon which it relied. However, the Court reasoned that live witnesses are more likely to be inevitably discovered by alternate, legal means.

> The greater the willingness of the witness to freely testify, the greater the

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[55] *Id.* at 449.

[56] *Id.*

[57] *Ceccolini, supra* at 280.

> likelihood that he or she will be discovered by legal means. . . . Witnesses can, and often do, come forward and offer evidence entirely of their own volition. And evaluated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence. The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify.[58]

In *Nix v. Williams,*[59] the Court specifically extended the "inevitable discovery doctrine" as an exception to the exclusionary rule. In *Nix,* officers elicited information from the defendant in the absence of counsel while being transported to another jurisdiction. The information concerned the location of his victim's body. Without defendant's statement, the body would have been discovered through independent search efforts within three to five hours.[60] The Court found that the exclusion of illegally obtained evidence should not place the government in a

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[58] *Id.* at 276-277.

[59] *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

[60] *Id.* at 448-449.

worse position than if counsel had been present during the interrogation.[61]

> Exclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial. The Sixth Amendment right to counsel protects against unfairness by preserving the adversary process in which the reliability of proffered evidence may be tested in cross-examination. . . .
>
> Nor would suppression ensure fairness on the theory that it tends to safeguard the adversary system of justice. To assure the fairness of trial proceedings, this Court has held that assistance of counsel must be available at pretrial confrontations where "the subsequent trial [cannot] cure [an otherwise] one-sided confrontation between prosecuting authorities and the uncounseled defendant." Fairness can be assured by placing the State and the accused in the same positions they would have been in had the impermissible conduct not taken place. However, if the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any overreaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings. In that situation, the State has gained no advantage

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[61] *Id.* at 444.

> at trial and the defendant has suffered no prejudice. Indeed, suppression of the evidence would operate to undermine the adversary system by putting the State in a *worse* position than it would have occupied without any police misconduct. . . .[62]

The United States Supreme Court recently granted certiorari in *Hudson v. Michigan*[63] to consider whether evidence discovered during an illegal search following a violation of the knock-and-announce rule could be otherwise admissible under the inevitable discovery doctrine. While both this case and *Nix* involved a violation of a defendant's Sixth Amendment right to counsel, the inevitable discovery doctrine has its roots in Fourth Amendment jurisprudence.[64] Therefore, the Court's decision in *Hudson* could potentially have a more far-reaching effect. However, at this time, we remain bound by *Nix* to apply the inevitable discovery doctrine.

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[62] *Id.* at 446-447 (internal citations omitted).

[63] *Hudson v. Michigan*, ___U.S.___, 125 S.Ct. 2964, 162 L.Ed.2d 886 (2005).

[64] See *Fitzpatrick v. New York*, 414 U.S. 1050, 1051, 94 S.Ct. 554, 38 L.Ed.2d 338 (1973) (dissent by White, J.) (questioning the wisdom of extending the independent source doctrine to "hypothetical," that is, "inevitable," discoveries incident to an illegal search).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

FORT HOOD, J., concurred.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood

TALBOT, J. (*concurring in part and dissenting in part*).

This case involves two issues: whether the prosecution can use defendant's suppressed statement as impeachment evidence in the event of a new trial and whether the prosecution can present the testimony of Wilbert Mack and Anthony Wright, witnesses who were referenced by defendant in his statement to the police. I concur that defendant's statements can be used as impeachment evidence at a new trial, but dissent from the majority's conclusion that the derivative evidence must be suppressed.

In 1995, defendant made several statements to the police. He told the police that he was present at the murder scene, but fled and got a ride home with "Will," one of two "street cleaners" whom he met at the Speedy-Q gas station. Defendant also admitted to the police that he knew that Idell Cleveland, his accomplice, "was going to rob them when he told me to get his gun," and that after the shooting, Cleveland gave him two $50 bills.

The background of this case is somewhat unusual. It reaches us following a federal district court determination that a writ of habeas corpus be granted under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. 2254(d)(1), because counsel was ineffective under the Sixth Amendment, and that the prosecution was prohibited from using defendant's statements in its case-in-chief. The federal district court found that the state court unreasonably analyzed the issues in this case under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), rather than *United States v. Cronic,* 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).[65] The federal district court concluded that the "absence of counsel during the interrogation tainted the whole trial process, as evidenced by the use of [defendant's] statements at trial." Under *Cronic,* the federal district court concluded, prejudice was presumed. The prosecutor apparently did not appeal that decision. Given this uncertain foundation, and the jumble of underlying issues, I question the value of a

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[65] In fact, contrary to the reasoning of the federal district court, *Cronic*-decided the same day as *Strickland*-does not represent a separate standard; rather, it provides an explanation of specific circumstances that are "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic,* 466 U.S. at 658. The presumed prejudice in *Cronic* is based on the premise that the attorney's failure to "subject the prosecution's case to meaningful adversarial testing" was complete. *Bell v. Cone,* 535 U.S. 685, 696-697, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). I see no evidence of that occurring here.

published decision in the case before us. Although this matter touches on questions of first impression, the sui generis nature of the facts limits the application of any ruling here, and I would caution that this opinion not be construed more broadly than the issues require.

The primary purpose of the exclusionary rule is to deter police misconduct, *Michigan v. Tucker,* 417 U.S. 433, 446, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974). The exclusionary rule, a judicially created doctrine, "'is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.'" *Id.,* 417 U.S. at 446 (quoting *Elkins v. United States,* 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669). "Despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons. . . ." *Stone v. Powell,* 428 U.S. 465, 486, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). "In sum, the rule is a judicially created remedy designed to safeguard the Fourth Amendment generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra,* 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974). "[A]pplication of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.*

As the majority acknowledges, police misconduct is not alleged in this case. There was no violation of

defendant's *Miranda* rights,[66] *Dickerson v. United States*, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), no "knowledge gained by the Government's own wrong" that must be suppressed, *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), and no deterrent purpose to be served by excluding the testimony of Mr. Mack and Mr. Wright.

In cases involving a violation of the Sixth Amendment right to counsel, exclusion of physical evidence is sometimes warranted to preserve "the adversary process in which the reliability of proffered evidence may be tested in cross-examination." *Nix v. Williams*, 467 U.S. 431, 446, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). The adversary system is undermined, however, if the suppression of evidence puts the state in a worse position that it would have occupied without any misconduct. *Id.*, 467 U.S. at 447.

In the case before us, the majority volunteers that it agrees with the federal district court that defendant was "abandoned" by his attorney and denied his Sixth Amendment right to the effective assistance of counsel. That issue is not before us but, in light of the majority's pronouncement, I note that I am not at all sure that the federal district court decision, which was based on arguments never raised

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[66] *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

by defendant in the state courts, is correct. The Antiterrorism and Effective Death Penalty Act was intended to "ensure that state-court convictions are given effect to the extent possible under law" and to provide habeas corpus relief when a state court decision is objectively unreasonable, but not where its application of federal law is merely erroneous or incorrect. *Bell v. Cone,* 535 U.S. 685, 693-694, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002). Although I see no evidence that the state court action in this case rose to the level of being "objectively unreasonable," I concede that we are bound by the unchallenged federal district court determination. For that reason, I concur with the majority's conclusion on the first issue, that defendant's voluntary statements to the police, even when obtained in violation of the Sixth Amendment right to counsel, may be used for impeachment purposes. See *Michigan v. Harvey,* 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990).

As for the second issue, however, the federal district court did not find, and I am not willing to concede, that the presumed prejudice in *Cronic* applies to the testimony of Mr. Mack and Mr. Wright. I see no reason to compound the problems in this case by further extending the judicially created exclusionary rule in a situation in which there was no government misconduct and no damage to the adversary process. Although the result of the majority decision would likely be negligible here, where the challenged evidence is of little moment, it creates an extension that could be devastating in future cases. Further,

even if the exclusionary rule were relevant here, remand would not be warranted. It is all but certain that defendant would have made reference to the "street cleaners" even if he had been represented by counsel, and that, even without defendant's statement, the witnesses would have been discovered in the course of a competent police investigation. And so I dissent from the remainder of the majority opinion.

As this Court recognized in a previous review of this matter, "If defendant's statements to the police had comported with his statements to counsel, he would not have inculpated himself in the crime. Rather he would have admitted that he was merely present while [another person] robbed and murdered the victims." *People v. Frazier (After Remand),* unpublished opinion per curiam of the Court of Appeals (Docket No. 193891, issued April 21, 2000), slip op, p 5. There is every reason to believe that defendant would have made his initial statement to the police even if counsel had accompanied him to the interview.

Even after trial, at the *Ginther*[67] hearing, defendant never denied being at the murder scene, he only argued that he was merely present. Before defendant spoke to the police, they were already aware that Kenneth Haywood had driven defendant and Idell Cleveland to the murder scene and that Haywood abandoned defendant there so that he had to find

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[67] *People v. Ginther,* 390 Mich. 436, 212 N.W.2d 922 (1973).

another way home.[68] According to defendant's trial counsel, defendant insisted that he wanted to give a truthful statement to the police in an effort to secure a plea bargain. Counsel said that he told defendant not to talk to the police, but that defendant maintained his innocence and wanted to "get his story out." Counsel testified that he advised defendant of the risks of talking to the police and said that "what he was telling me had to be the truth if he was going to be talking, in order to pursue a plea bargain." Defendant told counsel that he was not involved in the murders and that "he had no knowledge of the armed robbery, or of the robbery that was going to be occurring." Counsel explained defendant's "options" to him and advised him that "as long as he was honest and truthful," he could pursue a plea bargain with the police. Defendant was advised by the police of his rights, he chose to make statements, and those statements have been determined, on numerous occasions, to have been voluntary.

Because part of defendant's "story," even after he was convicted of the crimes, was that he was present at the murder scene and had to find a ride home, I believe that the challenge to the essentially neutral

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[68] Haywood testified at trial that Cleveland promised to give him $20 in exchange for a ride. Haywood testified that he drove Cleveland and defendant to a house and saw them go inside, that he heard Cleveland say, "Get on the floor," that he heard gunshots, and that he became frightened and drove away without waiting for Cleveland or defendant to return to the car.

testimony of Mr. Mack and Mr. Wright is much ado about nothing.[69] The record contains every assurance that, even if counsel had gone with defendant to the interview, defendant would have told the police that he was merely present and that he found a ride home with street cleaners after he fled the scene.

There appears to be no law precisely on point with this case and it is clear that the labyrinth of federal law can be read to support virtually any conclusion. The majority suggests that the cure for the alleged Sixth Amendment violation here is to apply the inevitable discovery exception to the exclusionary rule under *Nix*, 467 U.S. at 446. I believe this is an unwarranted extension of the doctrine, and I see no good reason to create a prophylactic rule to protect defendants who lie to their attorneys and then get into trouble by telling the police more of the truth than they intended. Nor do I agree that *Nix* governs the result in this case. As the majority explains, *Nix* involved a defendant who, in the absence of counsel,

[69] Mr. Mack and Mr. Wright did not know defendant. Because defendant did not dispute that he was present at the scene and had to find a ride home, the only damaging part of Mr. Mack's and Mr. Wright's testimony was that defendant asked them if they had "change for a 50." Neither witness ever saw any money in defendant's possession, but there was other evidence regarding a stack of money, with a $50 bill on top, at the scene before the shootings. As noted previously, defendant also told the police that accomplice Cleveland gave him two $50 bills after the shootings, but that statement would not be presented as substantive evidence at a new trial and is not relevant to this discussion.

told the police – who had promised not to question him – where to find the body of the murdered child. The evidence of the child's body was deemed admissible because its discovery was inevitable. *Nix,* 467 U.S. at 449-450. In my view, the doctrine of inevitable discovery simply does not apply on the facts of this case, where physical evidence is not at issue. "[I]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment," *id.*, 467 U.S. at 444 n. 5 while this case is rife with speculation.

Although the majority correctly notes that neither case is precisely on point, I believe that this case is far more like *Tucker* than it is like *Nix,* and that the exclusionary rule does not apply. The *Tucker* case involved a pre-*Miranda* interrogation and, while the defendant was asked if he wanted counsel, he was not advised that an attorney would be appointed if he could not afford one. *Tucker,* 417 U.S. at 435. Although the defendant in *Tucker* was interrogated before the decision in *Miranda,* his trial took place afterward, so the rule in *Miranda* applied. The defendant's statements themselves were excluded at trial, and the question on appeal was whether testimonial evidence derived from the interrogation needed to be excluded. *Tucker,* 417 U.S. at 437-439. The testimony at issue was that of a third party named by defendant as an alibi witness and, because the defendant's statements were voluntary and because the police conduct was a departure from

later-enacted "prophylactic standards" rather than actual misconduct, the testimony was deemed admissible. The Court emphasized that no particular pressure was placed on the defendant to make the statement and that "the evidence which the prosecution successfully sought to introduce was not a confession of guilt by respondent, or indeed even an exculpatory statement by respondent, but rather the testimony of a third party who was subjected to no custodial pressures." *Id.*, 417 U.S. at 449. Noting that "[h]ere we deal, not with the offer of respondent's own statements in evidence, but only with the testimony of a witness whom the police discovered as a result of respondent's statements," the Supreme Court reasoned that "the reliability of [the] testimony was subject to the normal testing process of an adversary system." *Id.* While *Tucker* was argued under Fifth Amendment principles, the Court concluded that "recourse to respondent's voluntary statements does no violence to such elements of the adversary system as may be embodied in the Fifth, Sixth, and Fourteenth Amendments." *Id.*, 417 U.S. at 450.

I do not believe that there can be a "bright line" rule of exclusion when it comes to living witnesses, and I am certain that this is neither the proper case nor the proper place to fashion such a rule. As the majority acknowledges, living witnesses are "'not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized.'" *United States v. Ceccolini,* 435 U.S. 268, 277, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978), quoting *Smith v. United*

States, 117 U.S. App. D.C. 1, 3-4, 324 F.2d 879 (1963). "The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, *per se,* since the living witness is an individual human personality whose attributes of will, perception memory and volition interact to determine what testimony he will give." *Ceccolini,* 435 U.S. at 277. "The time, place and manner of the initial questioning of the witness may be such that any statements are truly the product of detached reflection and a desire to be cooperative on the part of the witness. And the illegality which led to the discovery of the witness very often will not play any meaningful part in the witness' willingness to testify." *Id.*

The "Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process," *Nix,* 467 U.S. at 453 (Stevens, J., concurring). There was no *Miranda* violation in this case, no police misconduct, no claim of witness bias, no challenge to the "reliability of [the] proffered evidence," *id.,* 467 U.S. at 446 and nothing in the record to suggest that the adversarial process would be tainted by the testimony of Mr. Mack and Mr. Wright. This case does not involve physical evidence that could only have been discovered as a result of defendant's uncounseled statements. As in *Tucker,* the challenged evidence here is "only" the "testimony of a witness whom the police discovered as a result" of defendant's statements. *Tucker,* 417 U.S. at 450. If the name of a potential witness is "of no evidentiary significance, *per se,*" *Ceccolini,* 435 U.S. at 277 then

defendant here, who did not know the names of the witnesses, gave the police even less.

Moreover, even if defendant had not given any statement, there is every reason to believe that the identities of Mr. Mack and Mr. Wright would have been discovered in the course of a competent police investigation. It is clear that, before defendant was interviewed, the police had a great deal of information about the crime and about defendant's involvement in it. If defendant had not made any statement to the police, we can be sure that the investigation of these execution-style killings would have continued. At this point, it is impossible to say with certainty what would have happened next or whether the police would have sought information at the Speedy-Q gas station, and that is precisely why the United States Supreme Court has declined to apply the exclusionary rule to living witnesses. But, in keeping with human nature, it is more likely than not that Mr. Mack and Mr. Wright would have become aware of and taken an interest in news of the double murder that took place during their work hours and in the area where they worked. The record shows that both Mr. Mack and Mr. Wright recognized and identified defendant at trial. According to their testimony, they were at the Speedy-Q gas station every night in the course of their work. They testified willingly. There is no suggestion that they were subjected to any police pressure, and it is certain that they were subject to the "normal testing process of an adversary system" through cross-examination. *Tucker,* 417 U.S. at 449.

Suppression of their testimony would do nothing to preserve the adversary process, *Nix,* 467 U.S. at 446 and would place the police in a worse position than if defendant's Sixth Amendment right to counsel had not been violated.

The disqualification of "knowledgeable witnesses from testifying at trial" would be a serious obstruction "to the ascertainment of truth." *Ceccolini,* 435 U.S. at 277. As recognized by the majority, neither the exclusionary rule nor the inevitable discovery doctrine have been previously applied to the testimony of witnesses who were named in a defendant's statement, even when that statement was procured in the absence of counsel. *Tucker,* 417 U.S. at 444. Here, where the alleged constitutional violation played no "meaningful part in the witness[es]' willingness to testify," *Ceccolini,* 435 U.S. at 278 and the testimony was the product of free will, I believe that the testimony of Mr. Mack and Mr. Wright is admissible.

In my opinion, remanding this matter to the trial court is a waste of time and an exercise in pretense. Because there is no way to know what would have happened under different circumstances, the trial court will be forced by the majority, on remand, to either exclude the tenuous "fruit" of defendant's voluntary statement on what amounts to a whim, or to speculate that the witnesses would have been discovered as a result of a competent police investigation. I would prefer to admit that the connection between defendant's statements and the witnesses' willing testimony is too attenuated to presume

prejudice, and that the exclusionary rule simply does not apply in this case. The "cure" for the alleged Sixth Amendment violation here is the suppression of defendant's statements as substantive evidence against him. Defendant has been afforded that protection and is not entitled to anything more.

/s/ Michael J. Talbot

United States District Court,
E.D. Michigan, Southern Division.
Corey Ramone FRAZIER, Petitioner,
v.
Mary BERGHUIS, Respondent.
No. CIV A 02-CV-71741DT.

Aug. 6, 2003.

P.E. Bennett, State Appellate Defender's Office, Detroit, MI, for Petitioner.

Debra M. Gagliardi, Brenda E. Turner, Michigan Department of Attorney, General Habeas Corpus Division, Lansing, MI, for Respondent.

OPINION AND ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

DUGGAN, J.

Corey Ramone Frazier (Petitioner), a state prisoner currently confined at the Brooks Correctional Facility in Muskegon County, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner is currently serving concurrent terms of life imprisonment on two first-degree felony murder convictions and a consecutive term of two years imprisonment on two felony firearm convictions which were imposed following a jury trial in the Genesee County Circuit Court in 1996. For the reasons stated below, the petition for writ of habeas corpus shall be conditionally granted.

I. *Statement of Facts*

The Court of Appeals of Michigan, the last state court to rule on Petitioner's claims, stated the relevant facts of this case as follows:

> This case arises from the slayings of James Goff and Aaron McColgan in McColgan's home in Grand Blanc Township. Both men died of gunshot wounds to the head. Kenneth Haywood implicated [Petitioner] in the crime, stating that he drove [Petitioner] and codefendant Idell Cleveland to McColgan's home. Haywood heard gunshots after one of the victims allowed [Petitioner] and codefendant to enter the house. Three days after the crime, Sergeant Dan Collardey of the Grand Blanc Township Police Department presented a complaint, authorized by the prosecutor, to the magistrate, seeking a warrant for [Petitioner's] arrest. The court issued the warrant. [Petitioner] and his retained counsel arrived at the police station two days later so [Petitioner] could surrender to the police. Police officers then arrested [Petitioner] and he was subsequently arraigned.
>
> On the advice of counsel, [Petitioner] made a statement to the police two days after his arrest describing his involvement in the crime. Defense counsel allegedly encouraged [Petitioner] to make the statement even though the police and prosecutor had told him that they would not enter into a plea agreement. [Petitioner] subsequently made two more

> statements, one after he took a polygraph examination.

People v. Frazier, 1998 WL 1990402 (Mich.Ct.App. Aug.7, 1998)(*Frazier II*). Other facts pertinent to Petitioner's claims are discussed below.

II. *Procedural History*

Following sentencing, Petitioner filed an appeal as of right and a motion to remand with the Court of Appeals of Michigan, asserting several claims of error including ineffective assistance of counsel. The court denied the motion and, in a separate opinion, affirmed Petitioner's murder and felony firearm convictions but vacated his armed robbery conviction on double jeopardy grounds. *People v. Frazier,* 1998 WL 85299 (Mich.Ct.App. Feb.27, 1998) (*Frazier I*). The court subsequently granted Petitioner's motion for rehearing and withdrew its prior opinion. The Court issued a second opinion vacating the robbery conviction, finding several claims to be without merit, and remanding the case to the trial court for a hearing on whether trial counsel was ineffective for advising Petitioner to make statements to the police about his role in the crime. *See Frazier II.*

The trial court conducted the required evidentiary hearing on November 6, 1998. After the trial court's decision, on appeal the Court of Appeals of Michigan set forth the relevant testimony from that hearing as follows:

At the *Ginther* hearing, [Petitioner's] mother testified that she learned that the police were investigating [Petitioner's] involvement in two murders when officers executed a search warrant at her home three days after the victims' deaths. She immediately contacted defendant, who was vacationing in Illinois, and urged him to return home. She then attempted to retain an attorney for defendant, but found it difficult because it was a Saturday. She eventually consulted with an attorney that afternoon who urged her to contact UAW-GM legal services. [Petitioner] returned home on Sunday night. On Monday morning, five days after the murders, legal services referred [Petitioner's] mother to trial counsel. Counsel met with [Petitioner] and his mother later that morning.

[Petitioner's] mother testified that counsel and [Petitioner] did not discuss the circumstances surrounding the murders in depth. Instead, counsel contacted the police and arranged for [Petitioner] to surrender. [Petitioner's] mother maintained that counsel assured her and [Petitioner] from the beginning that he would secure a plea agreement in the case. Counsel then drove [Petitioner] to the police station. Later, [Petitioner's] mother went to the police station to authorize the officers to speak with her then seventeen-year-old son. She stated that counsel instructed her to go home rather than observe the interview. Counsel purportedly assured her that he would secure an agreement under which [Petitioner] would plead guilty

to armed robbery and serve seven years in a nearby prison.

[Petitioner] supported his mother's testimony. He stated that, on first meeting counsel, counsel merely asked him whether he "did it." He replied "no." Counsel then began arranging for [Petitioner's] surrender. [Petitioner] maintained that counsel, not he, actually raised the prospect of a plea bargain. Counsel told him that talking to the police was necessary to secure a plea agreement. According to defendant, counsel urged him to tell the police about the murders after they arrived at the police station. After the arraignment, counsel again advised [Petitioner] that it would be in his interest to talk to the police.

Trial counsel's testimony conflicted with that of [Petitioner] and his mother. Counsel stated that [Petitioner] maintained his innocence during their first meeting. According to counsel, [Petitioner] stated that he was not involved in the murders and that he did not know of codefendant's intent to rob the victims. Counsel maintained that both [Petitioner] and his mother stressed that they desired a plea bargain in the case. Counsel then contacted the police department. He learned from the investigating officer that the police believed that codefendant was the lead offender in the crime, but that they were not sure of the extent of [Petitioner's] involvement. Counsel stated that the officer

indicated that a possibility existed of resolving the case by plea bargain.

Counsel testified that, before driving [Petitioner] to the police station to surrender to police, he discussed with [Petitioner] whether [Petitioner] should speak with the officers. Counsel stated that [Petitioner] "wanted to talk;" that he "wanted to tell his story about his non-involvement, about his knowledge that he had nothing to do with the murders." Counsel gave [Petitioner] "both sides as to what he could say." After arraignment, counsel again discussed with [Petitioner] whether he should speak with the officers. Counsel testified: "I recall that he was maintaining his innocence. He wanted to talk. He wanted to get his story out. And I told him, that in pursuit of a plea bargain, that as long as he was honest and truthful, that we could go there." Counsel stated that he advised [Petitioner] about the risks of speaking with the officers. He explained to [Petitioner] that "what he was telling [counsel] had to be the truth if he was going to be talking, in order to pursue a plea bargain."[2]

Counsel acknowledged that an assistant prosecutor informed him on the date of

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[2] Counsel noted that [Petitioner's] inculpatory statements demonstrated that [Petitioner] "had been lying to [him]." In his statements to the police, [Petitioner] admitted that he supplied codefendant with the murder weapon and knew of codefendant's intent to rob the victims.

> arraignment that he had no authority to enter into a plea agreement. Further, after [Petitioner] made the inculpatory statements, counsel learned that the prosecutor did not intend to offer a plea bargain. Counsel explained, however, that, in his experience, the prosecutor's refusal to enter into a plea bargain before the preliminary examination does not foreclose the possibility of a plea agreement. Counsel stated that further developments in the case at the circuit court level could result in a plea bargain.

People v. Frazier, 2000 WL 33423200, *1-2 (Mich.Ct.App. April 21, 2000) (*Frazier III*). At the close of the hearing, the trial court denied Petitioner's motion for a new trial, concluding that counsel was not ineffective for advising Petitioner to speak to the police with the hope that a plea bargain would be forthcoming. *Id.*

The Court of Appeals of Michigan affirmed the trial court's decision, finding that counsel's strategy in advising Petitioner to speak with the police was reasonable based upon Petitioner's assertions of innocence and counsel's belief that a plea bargain could be forthcoming if Petitioner cooperated with the authorities. *See Frazier III* at *5. Petitioner thereafter filed an application for leave to appeal with the Michigan Supreme Court, which was denied. *People v. Frazier,* 464 Mich. 851, 625 N.W.2d 384 (2001).

Petitioner, through counsel, filed the present petition for writ of habeas corpus on May 2, 2002,

asserting that: (1) defense counsel's abandonment of Petitioner during the police interrogation violated the right to counsel and was a structural error so that normal standards of prejudice do not apply, and (2) defense counsel was ineffective because he waived Petitioner's *Miranda* rights, was not present during interrogations, and advised Petitioner to talk to the police about his role in the crime in the hope of receiving a favorable plea bargain even though counsel had been told by the police and prosecution that they would not bargain. Respondent filed an answer to the petition on November 8, 2002, contending that it should be denied for lack of merit.

III. *Standard of Review*

A. De Novo *Review*

The provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) govern this case because Petitioner filed this habeas petition after AEDPA's effective date. *See Lindh v. Murphy,* 521 U.S. 320, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997). Initially, Petitioner contends that AEDPA's standards do not apply to his claim of denial of counsel (claim 1) because the court of appeals did not rule on this claim. Petitioner's contention is without merit.

Petitioner argues that AEDPA's standards only apply to claims adjudicated on the merits in state courts. In the case at bar, Petitioner contends that the

court of appeals only adjudicated Petitioner's "ineffective assistance of counsel" claim under the Supreme Court's holding in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and not his claim of "denial of counsel" under *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). Petitioner's argument fails because the Supreme Court's holdings in *Strickland* and *Cronic* are different rules of law applied to the same claima Sixth Amendment claim of ineffective assistance of counsel.

In *Mickens v. Taylor,* 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002), the Supreme Court stated that under the Sixth Amendment, an accused has "the right to 'the assistance of counsel for his defence.'" *Id.* at 1240 (quoting the Sixth Amendment). The Court explained the rule of *Strickland* as "a defendant alleging a Sixth Amendment violation must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland*). The Court then stated that *Cronic* provides "an exception to this general rule." *Id.* This exception spares "the defendant the need of showing probable effect upon the outcome, and . . . simply presume[s] such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding." *Id.* at 1240-41.

Therefore, the court of appeals' application of a *Strickland* analysis rather than a *Cronic* analysis to Petitioner's Sixth Amendment claim does not mean

that the court did not adjudicate Petitioner's Sixth Amendment claim on the merits. As the Sixth Circuit explained in *Mitchell v. Mason,* 325 F.3d 732, 742 (6th Cir.2003), an application of *Strickland* to a particular case rather than *Cronic* would either be "an unreasonable extension of *Strickland* to the facts at hand or an incorrect choice of law in refusing to apply *Cronic* [,]" referring to AEDPA's "unreasonable application" and "contrary to" standards. Accordingly, Petitioner's contention that this Court review his denial of counsel claim *de novo* is without merit. AEDPA standards apply to Petitioner's denial of counsel claim in this Court.[3]

B. *AEDPA Standard*

AEDPA provides, in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

[3] The Court notes that although Petitioner argued before the court of appeals that "[t]he violation of the right to counsel was a structural error and requires automatic reversal without regard to normal tests of prejudice[ ]," (Pet'r's 9/28/99 Br. before the court of appeals at 24), Petitioner never specifically mentioned or cited *Cronic.*

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The United States Supreme Court has explained the correct standard of review under AEDPA as follows:

> Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied – the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing

> principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000)(O'Connor, J., delivering the opinion of the Court on this issue).

In evaluating a state court decision under the "unreasonable application" clause, the Supreme Court further stated that a federal habeas court "should ask whether the state court's application of clearly established federal law was objectively unreasonable." 120 S.Ct. 1521. "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 1522.

The Supreme Court also clarified that the phrase "clearly established Federal law, as determined by the Supreme Court of the United States," refers only to "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Id.* at 1523. In determining what constitutes clearly established federal law, therefore, a federal habeas court must look to pertinent United States Supreme Court precedent.

Lastly, a federal habeas court must presume that state court factual determinations are correct. 28

U.S.C. § 2254(e)(1). A habeas petitioner may rebut this presumption only with clear and convincing evidence. *See Warren v. Smith,* 161 F.3d 358, 360-61 (6th Cir.1998).

IV. *Analysis*

Petitioner claims that counsel's absence during police questioning deprived him of his Sixth Amendment right to counsel and was prejudicial *per se* under the principles set forth in *Cronic.*[4] Respondent contends that the *Cronic* standard is inapplicable to the case at hand.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to the assistance of counsel in order to protect the fundamental right to a fair trial. *See Mickens,* 122 S.Ct. at 1240. A defendant has "the right to rely on counsel as a 'medium' between him and the State." *Maine v. Moulton,* 474 U.S. 159, 106 S.Ct. 477, 487, 88 L.Ed.2d 481 (1985). Further, the Sixth Amendment right to counsel is the right to the effective assistance of counsel. *See Strickland,* 104 S.Ct. at 2063. Ordinarily, to prevail on a claim that counsel was ineffective, a habeas petitioner must establish

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[4] Petitioner also makes an alternative argument under *Strickland;* however, because the Court finds the court of appeals' decision was an unreasonable application of federal law in light of *Cronic,* the Court need not reach Petitioner's *Strickland* arguments.

that counsel's performance was deficient and that he was prejudiced by counsel's deficient performance. *Id.* at 2064. However, it is well-settled that "the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v. Flores-Ortega,* 528 U.S. 470, 120 S.Ct. 1029, 1038, 145 L.Ed.2d 985 (2000); *see also Cronic,* 104 S.Ct. at 2047 n. 25.

In *Bell v. Cone,* 535 U.S. 685, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002), the Supreme Court reaffirmed that three types of cases warrant *Cronic*'s presumption-of-prejudice analysis. The first is the complete denial of counsel, in which "the accused is denied the presence of counsel at 'a critical stage'" of a criminal proceeding. *Id.* at 1851 (citation omitted). The second is when counsel "'entirely fails to subject the prosecution's case to meaningful adversarial testing.'" *Id.* (citation omitted). The third is when counsel is "called upon to render assistance under circumstances where competent counsel very likely could not," such as a conflict of interest situation. *Id.* (citation omitted).

Petitioner relies upon the first scenario – the denial of counsel at a critical stage in the proceedings – to support his first claim for habeas relief. Under AEDPA, Petitioner contends that the court of appeals' evaluation of his claim "unreasonably applied clearly

established Supreme Court law established in . . . " *Cronic.*[5] (Pet'r's Br. at 27).

In the case at bar, the Court of Appeals of Michigan issued three opinions. In the first opinion, the court erroneously based its decision on the interrogations in question taking place before Petitioner was arraigned. *See Frazier I,* 1998 WL 85299 at *1 (stating the issue before the court involved "a post arrest, pre-arraignment custodial interrogation"). In that opinion, the court specifically stated that "[f]ollowing the initiation of the adversarial process, a defendant is entitled to the presence of counsel at *'critical' proceedings, including interrogations." Id.* (citations omitted; emphasis added). However, because the court was proceeding under the mistaken assumption that the interrogations had taken place before the initiation of adversarial proceedings, the court discussed only "whether adversary judicial proceedings actually begin before arraignment." *Id.* at *2.

On rehearing, the court again made the above quoted statement regarding "presence of counsel at 'critical' proceedings, including interrogations." *See Frazier II,* 1998 WL 1990402 at *1. The court, however, found the record to be inadequate for review of

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[5] Petitioner also cites *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), as clearly established law that the court of appeals unreasonably applied. *Gideon,* however, dealt with the right to assistance of counsel in general, not the *Cronic* issue upon which Petitioner's denial of counsel claim is based.

Petitioner's ineffective assistance of counsel claim and remanded the issue to the trial court for a hearing on "whether defendant was denied the effective assistance of counsel by trial counsel's advice that he make statements to the police about his role in the crime." *Id.* at *2.

On remand, the trial court decided the ineffective assistance of counsel issue against Petitioner. On appeal, the court of appeals analyzed the issue under the *Strickland* two-prong analysis and not the *Cronic* presumed prejudice analysis, even though it had previously found these post arraignment interrogations to be "critical proceedings" at which an accused is "entitled to the presence of counsel." The court then concluded that the trial counsel's strategy in advising Petitioner to talk to the police was reasonable. *See Frazier III,* 2000 WL 33423200 at *5.

It is apparent from the court of appeals' decisions that the court found the interrogations at issue to be a "critical stage" or "critical proceeding" at which Petitioner was "entitled to the presence of counsel. . . . " *Frazier I,* 1998 WL 85299 at *1; *Frazier II,* 1998 WL 1990402 at *1. It is undisputed that counsel was absent during the interrogations at issue. It is also undisputed, as Respondent states in its Answer in Opposition, that "[c]learly, when counsel is absent . . . during a critical stage of the proceedings a presumption of prejudice is mandated." (Resp't's Answer at 9)(citing *Cronic*). In this Court's opinion, the court of appeals' decision to apply a *Strickland* rather than

a *Cronic* analysis to Petitioner's case was an unreasonable application of clearly established federal law, *i.e.,* the law regarding absence of counsel established in *Cronic. See Mitchell,* 325 F.3d at 742 (explaining that an application of *Strickland* to a particular case rather than *Cronic,* would either be "an unreasonable extension of *Strickland* to the facts at hand or an incorrect choice of law in refusing to apply *Cronic*"). Therefore, Petitioner is entitled to federal habeas relief.

In *United States v. Morrison,* 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981), the Supreme Court held that "Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation. . . . " *Id.* at 668. The Court further stated that its approach "has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.*

In the case at bar, "the taint" did not occur during Petitioner's trial, but rather during the interrogations. The absence of counsel during the interrogations tainted the whole trial process, as evidenced by the use of Petitioner's statements at trial. Allowing the State to retry Petitioner with the use of the statements made during the tainted interrogations would lead only to yet another tainted trial. Therefore, the only appropriate remedy is to not allow use of the tainted statements, should the State decide to initiate a new trial in this matter.

Accordingly,

IT IS ORDERED that the Petition for Writ of Habeas Corpus is CONDITIONALLY GRANTED.

The Court ORDERS that the warden release Petitioner from custody, unless the State of Michigan initiates a new trial in this case, consistent with this Court's Opinion, within one hundred and twenty (120) days from the entry of this Order. Should the State appeal this decision to the United States Court of Appeals for the Sixth Circuit, this Order is stayed pending the disposition of that appeal.

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625 N.W.2d 384

Supreme Court of Michigan.
PEOPLE of the State of Michigan,
Plaintiff-Appellee,
v.
Corey Ramone FRAZIER, Defendant-Appellant.
Docket No. 116859.
COA No. 193891.

May 4, 2001.

Prior report: Mich.App., 1998 WL 85299

On order of the Court, the application for leave to appeal from the April 21, 2000 decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CORRIGAN, C.J., not participating.

MARILYN J. KELLY, J., dissents and states as follows:

I would grant leave because I believe that the Court of Appeals clearly erred in affirming the trial court's finding of no ineffective assistance of counsel. Defendant presents a persuasive argument that his trial counsel rendered ineffective assistance by permitting police officers to interrogate him about his role in a double homicide, without counsel's presence.

A defendant claiming to have been denied the effective assistance of counsel must establish that (1) his counsel's performance fell below an objective standard of reasonableness under prevailing professional

norms, and (2) a reasonable probability exists that, absent counsel's errors, the outcome of the proceedings would have been different. *See People v. Pickens*, 446 Mich. 298, 303, 521 N.W.2d 797 (1994).

Defense counsel's agreement to a meeting between defendant and investigating officers, during which he left defendant alone to speak with the officers, was not reasonable conduct under prevailing professional norms. *See Tyler v. United States (On Remand)*, 78 F.Supp. 2d 626, 632 (E.D.Mich., 1999), holding that counsel's actions in arranging a meeting between his client and government agents to discuss a plea agreement and then abandoning him to the government agents was unreasonable and unsound strategy.

The meeting resulted in prejudice to defendant because, without counsel present, defendant volunteered evidence that was later used against him at trial. While other evidence also indicated that defendant had been present at the scene of the crime, without the incriminating statements, nothing showed defendant's participation in the murders. Hence, there was a reasonable probability that, but for counsel's mistake, defendant's trial would have had a different outcome.

MICHAEL F. CAVANAGH, J., concurs with the statement of MARILYN J. KELLY, J.

People v. Frazier (After Remand), COA 193891

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. COREY RAMONE FRAZIER, Defendant-Appellant.	UNPUBLISHED April 21, 2000 No. 193891 Genesee Circuit Court LC No. 95-052613-FC AFTER REMAND

Before: CORRIGAN, P.J., and KELLY and HOEKSTRA*, JJ.

PER CURIAM.

This case returns after remand to the trial court for a *Ginther*[1] hearing on the issue whether defendant was denied the effective assistance of counsel by trial counsel's advice that he make statements to the police about his role in the crime. On remand, the trial court denied defendant's motion for new trial on grounds of ineffective assistance. We affirm.

* Supreme Court Justice, sitting on the Court of Appeals by assignment.

[1] *People v. Ginther*, 390 Mich. 436; 212 N.W.2d 922 (1973).

BEST AVAILABLE COPY

I. *Ginther* Hearing

At the *Ginther* hearing, defendant's mot testified that she learned that the police were in tigating defendant's involvement in two murc when officers executed a search warrant at her h three days after the victims' deaths. She immedia contacted defendant, who was vacationing in Illin and urged him to return home. She then attempte retain an attorney for defendant, but found it diffi because it was a Saturday. She eventually consul with an attorney that afternoon who urged he contact UAW-GM legal services. Defendant retur home on Sunday night. On Monday morning, days after the murders, legal services referred de dant's mother to trial counsel. Counsel met w defendant and his mother later that morning.

Defendant's mother testified that counsel defendant did not discuss the circumstances rounding the murders in depth. Instead, cou contacted the police and arranged for defendan surrender. Defendant's mother maintained t counsel assured her and defendant from the be ning that he would secure a plea agreement in case. Counsel then drove defendant to the po station. Later, defendant's mother went to the po station to authorize the officers to speak with then seventeen-year-old son. She stated that cou instructed her to go home rather than observe interview. Counsel purportedly assured her that would secure an agreement under which defend

would plead guilty to armed robbery and serve seven years in a nearby prison.

Defendant supported his mother's testimony. He stated that, on first meeting counsel, counsel merely asked him whether he "did it." He replied "no." Counsel then began arranging for defendant's surrender. Defendant maintained that counsel, not he, actually raised the prospect of a plea bargain. Counsel told him that talking to the police was necessary to secure a plea agreement. According to defendant, counsel urged him to tell the police about the murders after they arrived at the police station. After the arraignment, counsel again advised defendant that it would be in his interest to talk to the police.

Trial counsel's testimony conflicted with that of defendant and his mother. Counsel stated that defendant maintained his innocence during their first meeting. According to counsel, defendant stated that he was not involved in the murders and that he did not know of codefendant's intent to rob the victims. Counsel maintained that both defendant and his mother stressed that they desired a plea bargain in the case. Counsel then contacted the police department. He learned from the investigating officer that the police believed that codefendant was the lead offender in the crime, but that they were not sure of the extent of defendant's involvement. Counsel stated that the officer indicated that a possibility existed of resolving the case by plea bargain.

Counsel testified that, before driving defendant to the police station to surrender to police, he discussed with defendant whether defendant should speak with the officers. Counsel stated that defendant "wanted to talk;" that he "wanted to tell his story about his non-involvement, about his knowledge that he had nothing to do with the murders." Counsel gave defendant "both sides as to what he could say." After arraignment, counsel again discussed with defendant whether he should speak with the officers. Counsel testified: "I recall that he was maintaining his innocence. He wanted to talk. He wanted to get his story out. And I told him, that in pursuit of a plea bargain, that as long as he was honest and truthful, that we could go there." Counsel stated that he advised defendant about the risks of speaking with the officers. He explained to defendant that "what he was telling [counsel] had to be the truth if he was going to be talking, in order to pursue a plea bargain."[2]

Counsel acknowledged that an assistant prosecutor informed him on the date of arraignment that he had no authority to enter into a plea agreement. Further, after defendant made the inculpatory statements, counsel learned that the prosecutor did not intend to offer a plea bargain. Counsel explained,

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[2] Counsel noted that defendant's inculpatory statements demonstrated that defendant "had been lying to [him]." In his statements to the police, defendant admitted that he supplied codefendant with the murder weapon and knew of codefendant's intent to rob the victims.

however, that, in his experience, the prosecutor's refusal to enter into a plea bargain before the preliminary examination does not foreclose the possibility of a plea agreement. Counsel stated that further developments in the case at the circuit court level could result in a plea bargain.

The trial court credited trial counsel's version of events, finding as follows:

> In the case at bar, defendant Frazier was persistent in pursuit of a plea offer.
>
> * * *
>
> Under the facts of this case, it cannot be said that the pursuit of a plea bargain, where defendant wanted one, and, where the prosecution was not then interested, constitutes ineffective representation.
>
> Even though a plea bargain was not offered, defense counsel was able to argue that defendant cooperated with the police. He also contended that the police offered to help and, when they did not help he sent a letter to the family of murder victim McClogan [sic]. In that letter, that was read to the court, defendant asserted that he did not participate in the crime. Defendant testified that he talked to the police because he wanted a plea bargain. It was his belief that if he cooperated with the police, something would be worked out. At trial Sgt. Collardey, on examination by defense counsel, explained that defendant was cooperative with the police. Defense counsel also elicited from Sgt. Collardey that,

> even though defendant's statement was exculpatory, defendant's statement nevertheless aided the police in solving the matter by implicating codefendant Idell Cleveland. Attorney Meiers also obtained testimony from Sgt. Collardey and Det. Elford that defendant had not told them that he had killed either Aaron McColgan or James Goff.
>
> Defendant has failed to establish on this record that Mr. Meiers' representation was ineffective. Under the facts and circumstances of this case, Mr. Meiers' assistance followed a course having a reasonable basis to effectuate defendant's interests.

The trial court further determined that, regardless of counsel's performance, the trial produced a reliable result because substantial evidence existed to support the convictions.

II. Evidentiary Ruling

Defendant initially argues that the trial court erred in excluding the testimony of an expert witness regarding the standard of care in representing criminal defendants and whether trial counsel rendered effective assistance in this case. We disagree. We review the trial court's decision to admit or exclude expert testimony for an abuse of discretion. *People v. Christel,* 449 Mich. 578, 587; 537 N.W.2d 194 (1995); *People v. Murray,* 234 Mich.App. 46, 52; 593 N.W.2d 690 (1999).

MRE 702 governs the admissibility of testimony by expert witnesses. It provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The testimony must be relevant and assist the trier of fact to understand the evidence or to determine a fact in issue. *People v. Peterson,* 450 Mich. 349, 363; 537 N.W.2d 857, amended 450 Mich. 1212; 548 N.W.2d 625 (1995). The admissibility of expert testimony thus varies according to the subject matter and the particular facts of the case. *People v. Smith,* 425 Mich. 98, 106; 387 N.W.2d 814 (1986).

In the context of ineffective assistance of counsel claims, the trial court does not need expert testimony to understand the evidence because the court is as capable of evaluating counsel's conduct as any other attorney. See *Clemmons v. Missouri,* 785 S.W.2d 524, 531 (Mo, 1990); *New Jersey v. Moore,* 273 N.J. Super 118, 127-128; 641 A.2d 268 (1994). Therefore, the trial court may exclude the testimony on the ground that it will not assist it in determining whether counsel provided effective assistance. *Id.* Cf. *Freund v. Butterworth,* 165 F.3d 839, 863, n.34 (CA 11, 1999); *Nebraska v. Thomas,* 236 Neb. 553, 558; 462 N.W.2d

862 (1990); *Pennsylvania v. Neal,* 421 Pa. Super. 478, 481, n.4; 618 A.2d 438 (1992).

In this case, the expert witness would have merely offered his opinion regarding the propriety of counsel's advice. The experienced trial judge was, however, fully capable of making that determination without the assistance of an expert witness. We therefore conclude that the trial court did not abuse its discretion in determining that the evidence would not assist it in resolving the effective assistance issue. *Murray, supra* at 52.

III. Ineffective Assistance

Defendant argues that he was denied the effective assistance of counsel because trial counsel advised him to make incriminating statements to the police in the hope of receiving a favorable plea bargain, even though the prosecutor never offered a plea agreement. We disagree.

To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced him so as to deprive him of a fair trial. *People v. Pickens,* 446 Mich. 298, 338; 521 N.W.2d 797 (1994). Defendant must overcome the presumption that counsel's decision constituted sound strategy. *People v. Stanaway,* 446 Mich. 643, 687; 521 N.W.2d 557 (1994). Regarding the second requirement, defendant must show a reasonable probability that, but for counsel's errors, the

result of the proceeding would have been different. *People v. Johnson,* 451 Mich. 115, 122; 545 N.W.2d 637 (1996).

Counsel's action in advising defendant to make a statement in this case was a strategic decision. *Smith v. Rogerson,* 171 F.3d 569, 573 (CA 8, 1999). Advising a client to cooperate with law enforcement does not, as a matter of law, constitute ineffective assistance of counsel. *Tennessee v. Black,* 815 S.W.2d 166, 184 (Tenn, 1991). That counsel's strategy proved unsuccessful is not dispositive. *People v. Stewart (On Remand),* 219 Mich.App. 38, 42; 555 N.W.2d 715 (1996). Rather, we examine the evidence in the record to ascertain whether counsel's action was reasonable. See *Pickens, supra.* A defendant's statements to counsel and other information supplied by him are important factors in making this determination. See *Strickland v. Washington,* 466 U.S. 668, 691; 104 S. Ct. 2052; 80 L.Ed.2d 674 (1984).

In this case, we conclude that counsel did not act unreasonably in advising defendant to cooperate with the police. Rather, counsel employed a strategy designed to maximize the possibility of achieving defendant's stated objective – a plea agreement. The trial court credited trial counsel's testimony in this regard. It found that defendant was "persistent in pursuit of a plea offer." Because this finding rests on an evaluation of witness credibility, we defer to the trial court's resolution of the conflicting evidence. Cf. *People v. Farrow,* 461 Mich. 202, 209; 600 N.W.2d 634 (1999).

Trial counsel also permissibly relied on defendant's truthfulness regarding his innocence in advising him to cooperate with the police. *Barnes v. Thompson,* 58 F.3d 971, 979 (CA 4, 1995); *Ex parte Wilson,* 571 So.2d 1251, 1257 (Ala., 1990); *North Carolina v. Sneed,* 284 N.C. 606, 614; 201 S.E.2d 867 (1974). That defendant's statements to the police revealed extensive involvement in the crime is of no moment because we evaluate counsel's action from his perspective at the time he made the decision. *Strickland, supra* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Id.* In this case, the record contains no evidence that suggests that counsel should have doubted defendant's veracity during their initial meeting.

Under these circumstances, we cannot conclude that counsel's strategy to cooperate in the hope of leniency and a future plea agreement was unreasonable. See *Rachlin v. United States,* 723 F.2d 1373, 1379 (CA 8, 1983). If defendant's statements to the police had comported with his statements to counsel, he would not have inculpated himself in the crime. Rather, he would have admitted that he was merely present while codefendant robbed and murdered the victims.[3] He would have assisted the police in their

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[3] The officers already knew that defendant was present during the commission of the crime. Kenneth Haywood had informed the police that he drove defendant and codefendant to

(Continued on following page)

investigation by providing details of the crime. Further, although the assistant prosecutor had declined to offer a plea bargain before defendant spoke with the officers, counsel testified that, in his experience, the prosecutor may ultimately offer a plea bargain in a case even when declining to do so at the initial stages of the proceedings. Here, counsel, acting in reliance on defendant's assertions of innocence, reasonably advised defendant to cooperate with the police in an effort to obtain a plea agreement. Accordingly, we conclude that defendant was not denied the effective assistance of counsel. *Pickens, supra* at 338.

Affirmed.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

McColgan's home. He heard gunshots after one of the victims allowed defendant and codefendant to enter the home.

People v. Frazier (On Rehearing), COA 193891

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. COREY RAMONE FRAZIER, Defendant-Appellant.	UNPUBLISHED August 7, 1998 No. 193891 Genesee Circuit Court LC No. 95-052613-FC ON REHEARING

Before: Corrigan, C.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of two counts of first-degree felony murder, M.C.L. § 750.316; MSA 28.548, two counts of possession of a firearm during the commission of a felony, M.C.L. § 750.227b; MSA 28.424(2), and one count of armed robbery, M.C.L. § 750.529; MSA 28.797. The court sentenced defendant to two mandatory terms of life imprisonment without parole for murder, two mandatory two-year terms for his felony-firearm convictions, and life imprisonment for armed robbery. We vacate defendant's conviction for armed robbery and remand for further proceedings consistent with this opinion.

This case arises from the slayings of James Goff and Aaron McColgan in McColgan's home in Grand

Blanc Township. Both men died of gunshot wounds to the head. Kenneth Haywood implicated defendant in the crime, stating that he drove defendant and codefendant Idell Cleveland[1] to McColgan's home. Haywood heard gunshots after one of the victims allowed defendant and codefendant to enter the house. Three days after the crime, Sergeant Dan Collardey of the Grand Blanc Township Police Department presented a complaint, authorized by the prosecutor, to the magistrate, seeking a warrant for defendant's arrest. The court issued the warrant. Defendant and his retained counsel arrived at the police station two days later so defendant could surrender to the police. Police officers then arrested defendant and he was subsequently arraigned.

On the advice of counsel, defendant made a statement to the police two days after his arrest describing his involvement in the crime. Defense counsel allegedly encouraged defendant to make the statement even though the police and prosecutor had told him that they would not enter into a plea agreement. Defendant subsequently made two more statements, one after he took a polygraph examination.

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[1] A separate jury convicted codefendant Cleveland of two counts of first-degree murder, two counts of felony-firearm, and one count of armed robbery for his role in the murders. This Court affirmed the convictions. *People v. Cleveland,* unpublished opinion per curiam of the Court of Appeals, issued June 17, 1997 (Docket No. 194236).

I

Defendant first argues that he was denied the effective assistance of counsel because defense counsel advised him to waive his *Miranda*[2] rights and to make incriminating statements to the police in the hope of receiving a favorable plea bargain, even though the prosecutor never offered a plea agreement.

Both the Sixth Amendment, U.S. Const., Am. VI, and Const. 1963, art. 1, § 20, guarantee a defendant the right to counsel. Generally, our courts construe the two provisions identically. *People v. Winters,* 225 Mich.App. 718, 723-724; 571 N.W.2d 764 (1997); *People v. Richert (After Remand),* 216 Mich.App. 186, 194; 548 N.W.2d 924 (1996). Following the initiation of adversary judicial criminal proceedings, a defendant is entitled to the presence of counsel at "critical" proceedings, including interrogations. *United States v. Gouveia,* 467 U.S. 180, 189; 104 S. Ct. 2292; 81 L.Ed.2d 146 (1984); *Moore v. Illinois,* 434 U.S. 220, 226-227; 98 S. Ct. 458; 54 L.Ed.2d 424 (1977); *Brewer v. Williams,* 430 U.S. 387, 401; 97 S. Ct. 1232; 51 L.Ed.2d 424 (1977). The right to counsel under the Sixth Amendment also comprehends the right to the effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 685-686; 104 S. Ct. 2052; 80 L.Ed.2d 674 (1984).

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[2] *Miranda v. Arizona,* 384 U.S. 436; 86 S. Ct. 1602; 16 L.Ed.2d 694 (1966).

In this case, defendant had a Sixth Amendment right to counsel at the postarraignment interrogations.[3] *Michigan v. Jackson,* 475 U.S. 625, 629 n. 3; 106 S. Ct. 1404; 89 L.Ed.2d 631 (1986); *People v. Anderson (After Remand),* 446 Mich. 392, 403; 521 N.W.2d 538 (1994); *People v. Bladel (After Remand),* 421 Mich. 39, 52; 365 N.W.2d 56 (1984). The record, however, is inadequate to facilitate review of defendant's claim of ineffective assistance. We therefore remand this matter to the trial court for a *Ginther*[4] hearing on the issue whether defendant was denied the effective assistance of counsel by trial counsel's advice that he make statements to the police about his role in the crime. We limit the scope of remand to this narrow issue because, as discussed below, defendant's other assertions of error have no merit.

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[3] Although defendant has consistently maintained that the interrogations occurred after arraignment, the original record did not identify the date of arraignment. Generally, the appellant bears the burden of furnishing this Court with a record that supports his argument. *Petraszewsky v. Keeth (On Remand),* 201 Mich.App. 535, 540; 506 N.W.2d 890 (1993). In his motion for rehearing, defendant finally supplemented the record with an additional transcript that supports his assertion regarding the arraignment. Had defendant initially supplied this Court with a complete record in support of his claim, he would have prevented the needless expenditure of judicial resources and avoided unnecessary delay in obtaining the remedy of a hearing on his claim of ineffective assistance to which he is entitled.

[4] *People v. Ginther,* 390 Mich. 436; 212 N.W.2d 922 (1973).

II

Defendant contends that the trial court erred in denying his motion to suppress his three statements to the police on the ground that he made them while negotiating a plea bargain. We disagree. This Court reviews a trial court's determinations regarding the admissibility of evidence for an abuse of discretion. *People v. Honeyman,* 215 Mich.App. 687, 696; 546 N.W.2d 719 (1996). MRE 410(4) provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> * * *
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

To determine whether a defendant made a statement in the course of plea discussions, a court must apply a two-tiered analysis, asking: (1) whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and (2) whether the accused's expectation was reasonable under the totality of the circumstances. *People v. Dunn,* 446 Mich. 409, 415; 521 N.W.2d 255 (1994); *People v. Manges,* 134 Mich.App. 49, 59-60; 350 N.W.2d 829 (1984).

The trial court determined that defendant had an actual subjective expectation to negotiate a plea agreement, but the expectation was unreasonable under the totality of the circumstances. We agree. Defense counsel repeatedly requested a plea bargain, but the authorities consistently denied his requests. Defendant's mother testified that she encouraged defendant to tell the truth because of defense counsel's statements regarding a plea bargain, not because of statements by the police or prosecutor. Although defendant testified that Sergeant Dan Collardey promised to help him if he gave information, Collardey denied making such a statement. The trial court credited Collardey's testimony. Further, before each statement, the authorities gave defendant *Miranda* warnings, which informed him that his statements could be used against him, and both defendant and his counsel signed written *Miranda* waivers. *See Manges, supra* at 60-61. On these facts, the trial court did not abuse its discretion in admitting the evidence because defendant did not have a reasonable expectation of negotiating a plea when he made the statements.

The trial court also held that MRE 410 did not apply because defendant made the statements to the police instead of the prosecuting attorney. Defendant argues that the police were acting as agents of the prosecutor's office when he made the statements. The record does not support defendant's claim. Therefore, the trial court properly admitted the statements.

People v. Hannold, 217 Mich.App. 382, 391; 551 N.W.2d 710 (1996).

III

Defendant argues that defense counsel was ineffective because he limited his argument during the suppression hearing to MRE 410 and did not argue that the statements were involuntary. We disagree. To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced him. *People v. Pickens,* 446 Mich. 298, 338; 521 N.W.2d 797 (1994). Regarding the second requirement, defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v. Johnson,* 451 Mich. 115, 122; 545 N.W.2d 637 (1996).

Defendant contends that the trial court should have suppressed his statements because: (1) his counsel was not present when he made the statements, (2) the statements were involuntary and taken in violation of his *Miranda* rights and his rights to counsel and due process, and (3) he made his post-polygraph examination statement only after the police assured him that anything he said during a polygraph examination would be inadmissible. Defendant did not preserve this issue by raising it below. *People v. Connor,* 209 Mich.App. 419, 422; 531 N.W.2d 734 (1995). We review the issue nonetheless

because it involves an important constitutional question. *People v. Zinn,* 217 Mich.App. 340, 344; 551 N.W.2d 704 (1996).

After a defendant asserts his right to counsel at arraignment, the police may not directly initiate an interrogation, but rather must funnel all requests through defense counsel. *Michigan v. Jackson, supra* at 636. A defendant may, however, generally waive his Sixth Amendment right to counsel. *Brewer v. Williams, supra* at 403-404. Courts indulge every reasonable presumption against waiver, and the State must prove "an intentional relinquishment or abandonment of a known right." *Id.* at 404, quoting *Johnson v. Zerbst,* 304 U.S. 458, 464; 58 S. Ct. 1019; 82 L. Ed. 1461 (1938). A defendant may likewise waive his right to counsel under *Miranda. People v. Smielewski,* 214 Mich.App. 55, 61; 542 N.W.2d 293 (1995). Whether a defendant validly waived his right to counsel involves a two-part test:

> First, the waiver must be a product of a "free and deliberate choice rather than intimidation, coercion, or deception." Second, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." [*People v. Bender,* 452 Mich. 594, 604; 551 N.W.2d 71 (1996) (Cavanagh, J.) (citations omitted).]

Here, no *Jackson* violation occurred because the police proceeded through defense counsel to question defendant. Defendant then voluntarily waived his

right to counsel before making the first statement. Before defendant made his statement, Sergeant Collardey read him his *Miranda* rights and defendant signed a written waiver. Defense counsel was present and also signed the *Miranda* waiver. The record does not reflect that the police coerced, intimidated, or deceived defendant into waiving his rights. Defendant never stated that he wished to remain silent.

Defendant relies on *McNeil v. Wisconsin,* 501 U.S. 171; 111 S. Ct. 2204; 115 L.Ed.2d 158 (1991), and *Minnick v. Mississippi,* 498 U.S. 146; 111 S. Ct. 486; 112 L.Ed.2d 489 (1990), to support his contention that the police questioning was improper because his retained counsel was not actually present during questioning. These cases are distinguishable. In the present case, defense counsel accompanied defendant when he surrendered to the police and was present when defendant signed an express waiver of his *Miranda* rights. Therefore, unlike the *Minnick* defendant, defendant never invoked his *Miranda* right to counsel by requesting counsel during questioning; rather, he explicitly waived that right. *McNeil* is inapposite to the present case because it addressed whether an accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding also constitutes an invocation of his *Miranda* right to counsel. *McNeil, supra* at 173. Here, the police respected defendant's Sixth Amendment right to counsel. After consulting counsel, defendant voluntarily waived his right to have counsel present during the questioning.

Regarding his second statement, defendant argues that the statement was involuntary because the police did not readvise him of his *Miranda* rights following a two-hour interruption between the two statements. The failure to readvise defendant of *Miranda* warnings before each interrogation does not render his subsequent statements inadmissible. *People v. Littlejohn,* 197 Mich.App. 220, 223; 495 N.W.2d 171 (1992); *People v. Godboldo,* 158 Mich.App. 603, 607; 405 N.W.2d 114 (1986). Rather, a factual question arises whether the statements were voluntary. *Id.* Sergeant Collardey testified at the evidentiary hearing that defendant made the second statement on his own initiative because he wanted to clarify his prior statement. Defendant testified that he made the statement only after Collardey asked him if he wanted to clarify something. Even if defendant's testimony is true, the record does not reflect illegal police conduct, or that the police coerced defendant into making the statement. *See Littlejohn, supra.* Therefore, defendant voluntarily made the second statement.

We reject defendant's contention that his third statement was involuntary because Deputy Chief Michael Ahearne told him that any statement he made during a polygraph examination would not be admissible. Statements made before, during, and after a polygraph examination are not per se inadmissible. Rather, the question is whether the statements were voluntary under the totality of the circumstances. *People v. Ray,* 431 Mich. 260, 268; 430

N.W.2d 626 (1988); *People v. Hicks,* 185 Mich.App. 107, 113-114; 460 N.W.2d 569 (1990). In *Hicks,* this Court held that the trial court did not err in failing to suppress the defendant's statement, which he made after completing a polygraph examination, even though the police did not readvise the defendant of his *Miranda* rights. *Hicks, supra* at 113-114. This Court emphasized that the same individual who had earlier warned the defendant of his rights interrogated him after the examination and no significant time elapsed between the examination and the post-examination questioning. *Id.*

The circumstances in the present case are similar to those in *Hicks.* Deputy Chief Ahearne told defendant three days before the polygraph examination that any statements he made at the examination would be inadmissible. Detective Donald Elford gave defendant three forms containing different versions of the *Miranda* warnings shortly before conducting the polygraph exam, all of which defendant signed. Therefore, the statement was voluntary under the totality of the circumstances. Accordingly, defense counsel's decision not to argue alternate grounds for suppression did not constitute ineffective assistance of counsel. *People v. Daniel,* 207 Mich.App. 47, 59; 523 N.W.2d 830 (1994).

IV

Defendant asserts that his convictions of first-degree felony murder and the underlying felony of

armed robbery violated his right against double jeopardy. We agree and vacate his conviction and sentence for armed robbery. *People v. Gimotty,* 216 Mich.App. 254, 259; 549 N.W.2d 39 (1996).

Vacated in part and remanded. We retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

1998 WL 85299

Court of Appeals of Michigan.
PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v.
Corey Ramone FRAZIER,
Defendant-Appellant.
No. 95-052613-FC.

Feb. 27, 1998.

Before CORRIGAN, C.J., KELLY and HOEKSTRA, JJ.

CORRIGAN, C.J.

Defendant appeals by right his convictions by jury of two counts of first-degree felony murder, M.C.L. § 750.316; MSA 28.548, two counts of possession of a firearm during the commission of a felony, M.C.L. § 750.227b; MSA 28.424(2), and armed robbery, M.C.L. § 750.529; MSA 28.797. The court sentenced defendant to two mandatory terms of life imprisonment without parole for murder, two mandatory two-year terms for his felony-firearm convictions, and life imprisonment for armed robbery. This case presents an issue of first impression regarding whether a suspect has a constitutional right to the effective assistance of counsel during a post arrest, pre-arraignment custodial interrogation. We hold that a suspect does not, and affirm defendant's murder and felony-firearm convictions, but vacate his armed robbery conviction.

This case arises from the slayings of James Goff and Aaron McColgan in McColgan's home in Grand Blanc Township. Both men died of gunshot wounds to the head. Kenneth Haywood implicated defendant in the crime, stating that he drove defendant and codefendant Idell Cleveland[1] to McColgan's home. He heard gunshots after one of the victims allowed defendant and codefendant to enter the house. Three days after the crime, Sergeant Dan Collardey presented a complaint, authorized by the prosecutor, to the magistrate, seeking a warrant for defendant's arrest. The court issued the warrant. Defendant and his retained counsel arrived at the police station two days later so defendant could surrender to the police. Police officers then arrested defendant.

On the advice of counsel, defendant made a statement to the police two days after his arrest describing his involvement in the crime. Defense counsel encouraged defendant to make the statement even though the police and prosecutor had told him that they would not enter into a plea agreement. Defendant subsequently made two more statements, one after he took a polygraph examination. Defendant

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[1] A separate jury convicted codefendant of two counts of first-degree murder, two counts of felony firearm, and armed robber for his role in the murders. This Court affirmed the convictions. *People v. Cleveland*, unpublished opinion per curiam of the Court of Appeals, issued June 17, 1997 (Docket No. 194236).

was arraigned the day after he completed the polygraph examination, four days after his arrest.

I

Defendant first argues that he was denied the effective assistance of counsel because defense counsel advised him to waive his *Miranda*[2] rights and to make incriminating statements to police in the hope of receiving a favorable plea bargain, even though the prosecutor never offered a plea agreement. We reject defendant's claim. Defendant did not have the right to effective assistance of counsel during the police questioning.

Both the Sixth Amendment and Const. 1963, art. 1, § 20, guarantee a defendant the right to counsel. Generally, our courts construe the two provisions identically. *People v. Winters,* 225 Mich.App. 718, 723-724; ___ N.W.2d ___ (1997); *People v. Richert (After Remand),* 216 Mich.App. 186, 194; 548 N.W.2d 924 (1996). The Sixth Amendment right to counsel comprehends the right to the effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 685-686; 104 S. Ct. 2052; 80 L.Ed.2d 674 (1984). However, the right to counsel arises only at "the initiation of adversary judicial criminal proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Moore v. Illinois,*

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[2] *Miranda v. Arizona,* 384 U.S. 436; 86 S.Ct. 1602; 16 L.Ed.2d 694 (1966).

434 U.S. 220, 226-227; 98 S. Ct. 458; 54 L.Ed.2d 424 (1977) (quoting *Kirby v. Illinois,* 406 U.S. 682, 689; 92 S. Ct. 1877; 32 L.Ed.2d 411 (1972) (plurality opinion)). The Sixth Amendment does not confer a right to counsel before the initiation of adversary judicial criminal proceedings, even when the events may have important consequences at trial. *Davis v. United States,* 512 U.S. 452, 456;114 S. Ct. 2350; 129 L.Ed.2d 362 (1994); *Moran v. Burbine,* 475 U.S. 412, 432; 106 S. Ct. 1135; 89 L.Ed.2d 410 (1986). Following the initiation of the adversarial process, a defendant is entitled to the presence of counsel at "critical" proceedings, including interrogations. *United States v. Gouveia,* 467 U.S. 180, 189; 104 S. Ct. 2292; 81 L. Ed. 146 (1984); *Brewer v. Williams,* 430 U.S. 387, 401; 97 S. Ct. 1232; 51 L.Ed.2d 424 (1977).

This case presents an issue of first impression in Michigan regarding whether the Sixth Amendment right to counsel attaches when the police arrest a suspect on a warrant. The question of when adversary judicial criminal proceedings are initiated turns on the law of the jurisdiction in which the defendant is prosecuted. *See Moore, supra* at 228. In *People v. Bladel (After Remand),* 421 Mich. 39, 52; 365 N.W.2d 56 (1984), our Supreme Court determined that the defendant had a Sixth Amendment right to counsel at post arraignment interrogations. In affirming our Supreme Court's decision, the United States Supreme Court dismissed as "untenable" the state's argument that the arraignment did not represent the initiation of adversary judicial proceedings. *Michigan v. Jackson,*

475 U.S. 625, 629 n.3; 106 S. Ct. 1404; 89 L.Ed.2d 631 (1986). The Court explained:

> The Sixth Amendment guarantee of the assistance of counsel also provides the right to counsel at post arraignment interrogations. The arraignment signals the "initiation of adversary judicial proceedings" and thus the attachment of the Sixth Amendment . . . ; thereafter, government efforts to elicit information from the accused, including interrogation, represent "critical stages" at which the Sixth Amendment applies. [*Id.* at 629-630 (citations omitted).]

While our Supreme Court has plainly identified arraignment as the initiation point of adversary judicial proceedings, *see People v. Anderson (After Remand),* 446 Mich. 392, 403; 521 N.W.2d 538 (1994), Michigan courts have not previously decided whether adversary judicial proceedings actually begin before arraignment.[3] The question is now squarely before this Court

The majority of courts considering this question have held that an arrest on a warrant does not constitute the initiation of adversary judicial proceedings. Federal courts have uniformly held, in construing the Federal Rules of Criminal Procedure, that the Sixth Amendment right to counsel does not attach upon law

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[3] In *People v. Smielewski*, 214 Mich.App. 55, 61; 542 N.W.2d 293 (1995), this Court noted in dicta that arraignment signals "the initiation of the criminal prosecution."

enforcement's filing of a complaint, the court's issuing of an arrest warrant, or an arrest. *E.g. United States v. Langley,* 848 F.2d 152, 153 (CA 11, 1988); *United States v. Pace,* 833 F.2d 1307, 1312 (CA 9, 1987); *United States v. Duvall,* 537 F.2d 15, 22 (CA 2, 1976). Several state courts have reached the same conclusion. *State v. Falcon,* 196 Conn. 557, 562; 494 A.2d 1190 (1985); *Commonwealth v. Smallwood,* 379 Mass. 878, 884-885; 401 N.E.2d 802 (1980); *Morris v. State,* 532 S.W.2d 455, 456-458 (Mo., 1976). For example, the Supreme Court of Connecticut adopted a bright line rule, concluding that an arrest simply does not "call into play" the Sixth Amendment right to counsel. *Falcon, supra* at 562. Other courts have focused on the level of prosecutor involvement in the decision to arrest, and have held that an arrest, whether with or without a warrant, does not signal the initiation of adversarial proceedings when there is minimal or no prosecutor involvement. *People v. Hayes,* 139 Ill. 2d 89, 125-126; 564 N.E.2d 803 (1990); *State v. Masaniai,* 628 P.2d 1018, 1023 (Hawaii, 1981); *Lomax v. Alabama,* 629 F.2d 413, 416 (CA 5, 1980) (Alabama state prosecution); *McGee v. Estelle,* 625 F.2d 1206, 1208 (CA 5, 1980) (Texas state prosecution).

A minority of courts considering this question have held that the right to counsel attaches on law enforcement's filing of a complaint and the court's issuance of an arrest warrant. *Felder v. McCotter,* 765 F.2d 1245, 1247-1248 (CA 5, 1985) (Texas state prosecution); *Heffner v. State,* 530 N.E.2d 297, 302 (Ind., 1988); *People v. Superior Court of Fresno Co.,* 194 Cal.

Rptr. 525, 532; 145 Cal. App. 3d 581 (1984); *State v. Phelps,* 328 N.W.2d 136, 139 (Minn., 1982); *see also People v. Fulton,* 201 Cal. Rptr. 879, 884; 155 Cal. App. 3d 91 (1984) (holding that the right to counsel attached despite the absence of a formal charge or an arrest because circumstances demonstrated a "formal accusation"). Other courts have reached the same conclusion by focusing on the prosecutor's role in obtaining the warrant and the court's function in issuing it. *State v. Johnson,* 318 N.W.2d 417, 434-435 (Iowa, 1982); *Commonwealth v. Richman,* 458 Pa. 167, 171-174; 320 A.2d 351 (1974); *United States ex rel Robinson v. Zelker,* 468 F.2d 159, 163 (CA 2, 1972) (New York state prosecution).

Both the prosecutor and the court are involved in the issuing of an arrest warrant in Michigan. The first step in obtaining an arrest warrant is the filing of a complaint. MCR 6.101-102.

A complaint is a written accusation that a name or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense. [MCR 6.101(A).]

The prosecutor must approve the complaint in writing. MCR 6.101(C). The only exception to this requirement is the rare instance when a private citizen files the complaint along with security for costs. *Id.*; MCL 764.1(1); MSA 28.860(1)(1); *People v.*

Joker, 63 Mich.App. 421, 427-428; 234 N.W.2d 550 (1975).

After law enforcement files a proper complaint, the court must issue an arrest warrant or summons if it finds probable cause to believe that the person named in the complaint committed the alleged offense. MCR 6.102(A). The warrant must:

> (1) contain the accused's name, if known, or an identifying name or description;
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> (2) describe the offense charged in the complaint;
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> (3) command a peace officer or other person authorized by law to arrest and bring the accused before a judicial officer of the judicial district in which the offense allegedly was committed or some other designated court; and
>
> (4) be signed by the court. [MCR 6.102(C).]

Once an officer makes an arrest on a warrant, he must either release the suspect or, without unnecessary delay, take the person arrested before a court for arraignment.[4] MCR 6.104(A).

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[4] If the officer makes an warrantless arrest, the officer must file a proper complaint at or before the time of arraignment. The court must find probably cause, and then either issue a warrant or endorse upon the complaint its finding and direct that the person be taken before a magistrate of the judicial district in which the offense is alleged to have been committed. MCR

(Continued on following page)

We agree with the Connecticut court that "[n]either the request of a state's attorney, nor the action of a court in granting that request, converts an arrest warrant into an official accusation signaling the state's commitment to prosecute." *Falcon, supra* at 562. We are guided in our decision by the *Kirby* Court's explanation of adversary criminal judicial proceedings:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of an organized society, and immersed in the intricacies of substantive and procedural law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. [*Kirby, supra* at 689-690.]

Although the prosecutor and the court are intimately involved in issuing an arrest warrant, this involvement occurs in the investigation phase. After the police make the arrest and question the suspect, the police and the prosecutor may simply decide to

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6.104(D); MCL 764.1c; MSA 28.860(3). The court must then arraign the accused. *Id.*

release the suspect and not proceed with a formal charge.[5] Moreover, no reason exists to differentiate an arrest on a warrant from a warrantless arrest for purposes of when the Sixth Amendment right to counsel attaches. We also note that the Supreme Court has never held that the right to counsel attaches at the time of arrest. *Gouveia, supra* at 190.

That the police have focused their investigation on a particular suspect is not determinative of when the right to counsel attaches. The Supreme Court first recognized a right to counsel during a police interrogation in *Massiah v. United States,* 377 U.S. 201; 84 S. Ct. 1199; 12 L.Ed.2d 246 (1964), and *Escobedo v. Illinois,* 378 U.S. 478; 84 S. Ct. 1758; 12 L.Ed.2d 977 (1964). Before *Massiah* and *Escobedo,* the Court had declined to recognize a constitutional right to counsel during an interrogation because to do so would impede law enforcement's ability to investigate and solve crimes. *Crooker v. California,* 357 U.S. 433, 441; 78 S. Ct. 1287; 2 L.Ed.2d 1448 (1958); *Cicenia v. LaGay,* 357 U.S. 504, 509; 78 S. Ct. 1297; 2 L.Ed.2d 1523 (1958). In *Massiah,* the Court held that the police violated a defendant's Sixth Amendment right to counsel by using an informant to elicit incriminating statements from the defendant after he

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[5] Because the decisions to authorize a warrant and file formal charges are within the prosecutor's discretion, the prosecutor may decline to formally charge a suspect even when he has previously authorized a warrant. *See* ABA Standards for Criminal Justice (3d Ed.), Standards 3-3.4 & 3-3.9.

was indicted. In *Escobedo,* the Court held that the police violated a defendant's Sixth Amendment right to counsel by refusing to allow the defendant to consult with counsel during a post arrest, pre-indictment interrogation. Emphasizing the potential ramifications of the interrogation on trial, the Court determined that the right to counsel attaches when the police investigation shifts from a general investigation to one that focuses on a particular suspect with a goal of eliciting incriminating evidence from him. *Escobedo, supra* at 486-492. However, after *Miranda v. Arizona,* 384 U.S. 436; 86 S. Ct. 1602; 16 L.Ed.2d 694 (1966), the Court abandoned this approach for one that uses the initiation of judicial proceedings as the trigger for the Sixth Amendment right to counsel.

In *Miranda, supra* at 442, 465-466, the Court shifted the basis for its decision in *Escobedo, supra,* from the Sixth Amendment to the "prophylactic" right to counsel arising from the Fifth Amendment. The Court explicitly acknowledged this transformation twenty years later. *Moran, supra* at 429-430. The Court also harmonized *Massiah, supra,* and later decisions, by explaining that the right to counsel recognized in *Massiah* is grounded in the Sixth Amendment because the interrogation occurred after the commencement of adversary judicial proceedings. *Brewer, supra* at 400-401. Thus, the Court signaled that while the *Miranda* right to counsel may restrict a police investigation before the prosecutor files formal charges, the Sixth Amendment right to counsel only

comes into play when the prosecutor initiates adversary judicial proceedings. That the court and the prosecutor are involved in the investigation process is not the decisive factor in determining whether adversary judicial proceedings have commenced. For example, a witness has no Sixth Amendment right to counsel in a grand jury proceeding. *United States v. Mandujano,* 425 U.S. 564, 581; 96 S. Ct. 1768; 48 L.Ed.2d 212 (1976) (plurality opinion); *In re Grand Jury Proceedings,* 713 F.2d 616, 617 (CA 11, 1983); *People v. Hoffman,* 205 Mich.App. 1, 12-13; 518 N.W.2d 817 (1994). The Sixth Amendment right to counsel limits the government's investigation powers only after the prosecutor files formal charges. *Maine v. Moulton,* 474 U.S. 159, 179-180; 106 S. Ct. 477; 88 L.Ed.2d 481 (1985).

That a suspect has retained counsel before a prearraignment interrogation is likewise irrelevant to our determination of when the Sixth Amendment right to counsel attaches. The right to counsel does not attach at different times depending on the fortuity of whether a suspect happens to retain counsel. *Moran, supra* at 430. The existence of an attorney-client relationship cannot logically trigger Sixth Amendment protections. *Id.* Rather, a prosecutor's commitment to prosecute, not a suspect's action in retaining counsel, dictates when the right to counsel attaches. *See Kirby, supra* at 689-690.

For purposes of the Sixth Amendment right to counsel, adversary judicial criminal proceedings in Michigan are initiated at arraignment, *i.e.* the

defendant's first court appearance, not at the prosecutor's filing of a complaint, the court's issuance of an arrest warrant, or an arrest. This Court has recognized the significance of the arraignment in our criminal procedure:

> An arraignment on the warrant has several functions: it provides formal notice of the charge against the accused; the magistrate informs the accused of his right to counsel and inquiry is made to determine whether he is in need of appointed counsel; the preliminary examination may be waived or set for a certain date; and the arraigning judge may fix bail. [*People v. Killebrew,* 16 Mich.App. 624, 627; 168 N.W.2d 423 (1969).][6]

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[6] At the arraignment, the court must:

(1) inform the accused of the nature of the offense charged, and its maximum possible prison sentence and any mandatory minimum sentence required by law;

(2) if the accused is not represented by a lawyer at the arraignment, advise the accused that

(a) the accused has a right to remain silent,

(b) anything the accused says orally or in writing can be used against the accused in court,

(c) the accused has a right to have a lawyer present during any questioning consented to, and

(d) if the accused does not have the money to hire a lawyer, the court will appoint a lawyer for the accused;

(Continued on following page)

It is at the arraignment when the prosecutor formally accuses the defendant of a crime and the defendant is immersed in the intricacies of criminal procedure. At this stage, the adverse positions of the government and the defendant have solidified, and the Sixth Amendment right to counsel attaches. *Kirby, supra* at 689.

Here, defendant's Sixth Amendment right to counsel had yet to attach when counsel allegedly made the errors that underlie defendant's claim of ineffective assistance. Defendant did, however, have a right to counsel during the custodial interrogations subsequent to his arrest. *Miranda, supra* at 474. That right to counsel is not founded in the text of the Sixth Amendment, but rather is a prophylactic right found in the Supreme Court's jurisprudence relating to the

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(3) advise the accused of the right to a lawyer at all subsequent court proceedings and, if appropriate, appoint a lawyer;

(4) set a date within the next 14 days for the accused's preliminary examination and inform the accused of the date;

(5) determine what form of pretrial release, if any, is appropriate; and

(6) ensure that the accused has been fingerprinted as required by law.

The court may not question the accused about the alleged offense or request that the accused enter a plea. [MCR 6.104(E).]

MCR 6.005 sets forth the procedure for advising the defendant about his right to counsel at the arraignment and the appointment counsel for indigent defendants.

Fifth Amendment right against compelled self-incrimination. *McNeil v. Wisconsin,* 501 U.S. 171, 176; 111 S. Ct. 2204; 115 L.Ed.2d 158 (1991). The question is whether this right to counsel comprehends the right to the effective assistance of counsel. We hold that it does not.

In *Evitts v. Lucey,* 469 U.S. 387; 105 S. Ct. 830; 83 L. Ed. 821 (1985), the Supreme Court considered a similar question involving whether the Fourteenth Amendment right to counsel in a first appeal as of right comprehends the right to effective assistance of counsel. The Court held that it did. The Court explained that the constitutional guarantee of effective assistance of counsel at trial is "addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law." *Evitts, supra* at 396. Comparing appellate and trial proceedings, the Court held that a first appeal as of right is not in accord with due process of law if the defendant does not receive the effective assistance of counsel. *Id.* The Court emphasized that, as at trial, the defendant pursuing an appeal is unable to protect the vital interests at stake because he must face an adversary proceeding governed by intricate rules that are difficult for a layperson to comprehend. *Id.* In the end, the Court noted that a party whose counsel does not provide effective representation on appeal is in no better position than one who has no counsel at all. *Id.*

The right to counsel during a custodial interrogation serves an entirely different purpose than the

right to counsel at trial. The prophylactic right to counsel is designed to counteract the "inherently compelling pressures" of custodial interrogation and secure a person's privilege against self-incrimination by allowing a suspect to elect to converse with the police only through counsel. *McNeil, supra* at 176; *Edwards v. Arizona,* 451 U.S. 477, 484; 101 S. Ct. 1880; 68 L.Ed.2d 378 (1981); *Miranda, supra* at 444. The Sixth Amendment right to counsel, by contrast, is designed to protect the unaided layperson at critical trial-type confrontations with his adversary. *Gouveia, supra* at 189-190. A suspect is not faced with this type of adversary proceeding during a pre-arraignment custodial interrogation. Rather than guiding a defendant through the maze of criminal procedure, counsel guards against police coercion by counsel's mere presence during the questioning. In this context, nominal representation[7] renders the proceedings

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[7] The Supreme Court used the phrase "nominal representation" in *Evitts, supra* at 396, to describe circumstances where a defendant was accorded his "right to counsel" because he had an attorney. We use the phrase in this case to describe counsel who fulfills the function of counsel for purposes of *Miranda*. The prophylactic right to counsel under *Miranda* is designed to secure an accused's right against "compelled" self-incrimination, not to prevent the prosecution from using a defendant's freely and voluntarily made statement against him at trial. We do not condone trial counsel's alleged actions, we merely state that defendant was accorded his right to counsel. The question presented is not whether counsel fulfilled his ethical obligations, but rather whether the right to counsel under *Miranda* comprehends the right to effective assistance of counsel. "[T]he right to the effective assistance of counsel is recognized not for its own

(Continued on following page)

constitutionally adequate. Therefore, the right to counsel under *Miranda* does not comprehend the right to effective assistance of counsel. Consequently, defendant's ineffective assistance of counsel claim premised on counsel's advising him to make a statement to police fails because his Sixth Amendment right to counsel had yet to attach when counsel allegedly erred. *Wainwright v. Torna,* 455 U.S. 586, 587-588; 102 S. Ct. 1300; 71 L.Ed.2d 475 (1982); *Claudio v. Scully,* 982 F.2d 798, 802 (CA 2, 1992).

Defendant next argues that defense counsel was ineffective because he limited his argument at the suppression hearing to MRE 410 and did not argue that the statements were involuntary. We disagree. To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced him. *People v. Pickens,* 446 Mich. 298, 338; 521 N.W.2d 797 (1994). Regarding the second requirement, defendant must show a reasonable probability that, but for counsel's errors, the

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sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658; 104 S.Ct 2039; 80 L.Ed.2d 657 (1984). Stated otherwise, the constitutional guarantee of effective assistance of counsel "is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law." *Evitts, supra* at 396. If we were to recognize a right to effective assistance of counsel within the *Miranda* right to counsel, we would be doing so for its own sake because the procedure does not affect the accused's ability to receive a fair trial.

result of the proceeding would have been different. *People v. Johnson,* 451 Mich. 115, 122; 545 N.W.2d 637 (1996). Here, as discussed below, defendant voluntarily made the statements. Therefore, defense counsel's decision not to argue alternate grounds for suppression did not constitute ineffective assistance of counsel. *People v. Daniel,* 207 Mich.App. 47, 59; 523 N.W.2d 830 (1994).

II

Defendant contends that the trial court erred in denying his motion to suppress his three statements to police on the ground that he made them while negotiating a plea bargain. We disagree. This Court reviews a trial court's determinations regarding the admissibility of evidence for an abuse of discretion. *People v. Honeyman,* 215 Mich.App. 687, 696; 546 N.W.2d 719 (1996). MRE 410(4) provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

To determine whether a defendant made a statement in the course of plea discussions, a court must

apply a two-tiered analysis, asking: (1) whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and (2) whether the accused's expectation was reasonable under the totality of the circumstances. *People v. Dunn,* 446 Mich. 409, 415; 521 N.W.2d 255 (1994); *People v. Manges,* 134 Mich.App. 49, 59-60; 350 N.W.2d 829 (1984).

The trial court determined that defendant had an actual subjective expectation to negotiate a plea agreement, but the expectation was not reasonable under the totality of the circumstances. We agree. Defense counsel repeatedly requested a plea bargain, but the authorities consistently denied his requests. Defendant's mother testified that she encouraged defendant to tell the truth because of defense counsel's statements regarding a plea bargain, not because of statements by the police or prosecutor. Although defendant testified that Sergeant Dan Collardey promised to help him if he gave information, Collardey denied making such a statement. The trial court credited Collardey's testimony. Further, before each statement, the authorities gave defendant *Miranda* warnings, which informed him that his statements could be used against him, and both defendant and his counsel signed written *Miranda* waivers. *See Manges, supra* at 60-61. On these facts, the trial court did not abuse its discretion in admitting the evidence because defendant did not have a reasonable expectation of plea negotiations when he made the statements.

The trial court also held that MRE 410 did not apply because defendant made the statements to police instead of the prosecuting attorney. Defendant argues that the police were acting as agents of the prosecutor's office when he made the statements. The record does not support defendant's claim. Therefore, the trial court properly admitted the statements. *People v. Hannold,* 217 Mich.App. 382, 391; 551 N.W.2d 710 (1996).

III

Defendant argues that the trial court should have suppressed his statements because: (1) his counsel was not present when he made the statements; (2) the statements were involuntary, were taken in violation of his *Miranda* rights and his rights to counsel and due process; and (3) he made his post-polygraph examination statement only after the police assured him that anything he said during a polygraph examination would be inadmissible. Defendant did not preserve this issue by raising it below. *People v. Conner,* 209 Mich.App. 419, 422; 531 N.W.2d 734 (1995). We review the issue nonetheless because it involves an important constitutional question. *People v. Zinn,* 217 Mich.App. 340, 344; 551 N.W.2d 704 (1996).

The police did not violate defendant's Sixth Amendment right to counsel because that right to counsel had yet to attach when defendant made his statements. However, under *Miranda, supra,* defendant did have a

right to have counsel present during the custodial interrogations. *People v. Smielewski,* 214 Mich.App. 55, 60; 542 N.W.2d 293 (1995). Yet, one may waive this right by voluntarily waiving his *Miranda* rights. *Id.* at 61. Whether a defendant validly waived his right to counsel involves a two-part test:

> First, the waiver must be a product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. [*People v. Bender,* 452 Mich. 594, 604; 551 N.W.2d 71 (1996) (Cavanagh, J.) (citations omitted.)]

Here, defendant voluntarily waived his right to counsel before making the first statement. Before defendant made his statement, Sergeant Collardey read him his *Miranda* rights and defendant signed a written waiver. Defense counsel was present, and also signed the *Miranda* waiver. The record does not reflect that the police coerced, intimidated, or deceived defendant into waiving his rights. Defendant never stated that he wished to remain silent.

Defendant cites *McNeil, supra,* and *Minnick v. Mississippi,* 498 U.S. 146; 111 S. Ct. 486; 112 L.Ed.2d 489 (1990), to support his contention that police questioning was improper because his retained counsel was not actually present during questioning. These cases are distinguishable. In the present case, defense counsel accompanied defendant when he

surrendered to the police, and was present when defendant signed an express waiver of his *Miranda* rights. Therefore, unlike the *Minnick* defendant, defendant never invoked his *Miranda* right to counsel by requesting counsel during questioning; rather, he explicitly waived that right. *McNeil* is inapposite to the present case because it addressed whether an accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding also constitutes an invocation of his *Miranda* right to counsel. *McNeil, supra* at 173.

Regarding his second statement, defendant argues that the statement was involuntary because the police did not readvise him of his *Miranda* rights following a two-hour interruption between the two statements. The failure to readvise defendant of *Miranda* warnings before each interrogation does not render his subsequent statements inadmissible. *People v. Littlejohn,* 197 Mich.App. 220, 223; 495 N.W.2d 171 (1992); *People v. Godboldo,* 158 Mich.App. 603, 607; 405 N.W.2d 114 (1986). Rather, a factual question arises whether the statements were voluntary. *Id.* Sergeant Collardey testified at the evidentiary hearing that defendant made the second statement on his own initiative because he wanted to clarify his prior statement. Defendant testified that he made the statement only after Collardey asked him if he wanted to clarify something. Even if defendant's testimony is true, the record does not reflect illegal police conduct, or that the police coerced defendant into making the statement. *See Littlejohn,*

supra. Therefore, defendant voluntarily made the second statement.

We reject defendant's contention that his third statement was involuntary because Deputy Chief Ahearne told him that any statement he made at a polygraph examination would not be admissible. Statements made before, during, and after a polygraph test are not per se inadmissible. Rather, the question is whether the statements were voluntary under the totality of the circumstances. *People v. Ray,* 431 Mich. 260, 268; 430 N.W.2d 626 (1988); *People v. Hicks,* 185 Mich.App. 107, 113-114; 460 N.W.2d 569 (1990). In *Hicks,* this Court held that the trial court did not err in failing to suppress the defendant's statement, which he made after completing a polygraph examination, even though the police did not readvise the defendant of his *Miranda* rights. *Hicks, supra* at 113-114 This Court emphasized that the same individual who had earlier warned the defendant of his rights interrogated him after the examination and no significant time elapsed between the examination and the post-examination questioning. *Id.*

The circumstances in the present case are similar to those in *Hicks.* Deputy Chief Ahearne told defendant three days before the polygraph examination that any statements he made at the examination would be inadmissible. Detective Elford gave defendant three forms containing different versions of the *Miranda* warnings shortly before conducting the polygraph exam, all of which defendant signed.

Therefore, the statement was voluntary under the totality of the circumstances.

IV

Defendant asserts that his convictions of first-degree felony murder and the underlying felony of armed robbery violated his right against double jeopardy. We agree, and vacate his conviction and sentence for armed robbery. *People v. Gimotty,* 216 Mich.App. 254, 259; 549 N.W.2d 39 (1996). We affirm defendant's murder and felony firearm convictions.

Affirmed in part, and vacated in part.

KELLY, J. (dissenting).

I respectfully dissent, because I do not agree with the majority's holding that the Fifth Amendment, or *Miranda,*[1] right to counsel during custodial interrogation is nothing more than an assurance of "nominal representation" by an attorney, whatever that might entail.

I would hold that the Fifth Amendment right to counsel encompasses the right to effective assistance of counsel at custodial interrogation. The Fifth Amendment states, as pertinent, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const., Am. V. The United

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[1] *Miranda v. Arizona,* 384 U.S. 436; 86 S.Ct. 1602; 16 L.Ed.2d 694 (1966).

States Supreme Court has described the Fifth Amendment privilege against self-incrimination as "the essential mainstay of our adversary system," and distilled the constitutional policies underlying the privilege "to one overriding thought:"

> the respect a government – state or federal – must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. [*Miranda v. Arizona*, 384 U.S. 436, 460; 86 S. Ct. 1602; 16 L.Ed.2d 694 (1966) (citations omitted).]

With these notions in mind, and being aware of the "inherently compelling pressures" of custodial interrogation, the Supreme Court recognized both a Fifth Amendment right to consult with counsel prior to custodial interrogation, and a right to counsel's presence during custodial questioning. *Id.* at 469-470. The rights to consult with an attorney before custodial interrogation and to have counsel present during custodial interrogation are guaranteed "in order to protect the privilege" against self-incrimination, *Id.* at 472, or, stated otherwise, "to assure that the individual's right to choose between silence and speech

remains unfettered throughout the interrogation process," *Id.* at 469. Moreover,

> [t]he presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. [*Id.* at 470.]

I do not concur in the majority's narrow view of the *Miranda* right to counsel. It is true that there are differences between the right to counsel at custodial interrogation under the Fifth Amendment and the right to assistance of counsel as guaranteed by the Sixth Amendment. *Patterson v. Illinois,* 487 U.S. 285, 297; 108 S. Ct. 2389; 101 L.Ed.2d 261 (1988). However, one right is not more important than the other. *Id.* at 297-298. Primarily, both rights assure that our adversarial criminal system will operate fairly and with appropriate respect for the rights of the accused. *Miranda, supra* at 460; *Strickland v. Washington,* 466 U.S. 668, 685; 104 S. Ct. 2052; 80 L.Ed.2d 674 (1984). I would hold that the Fifth Amendment right to counsel, like the Sixth Amendment right to counsel, necessarily encompasses the right to assistance from

a competent attorney. If the right to counsel as recognized in *Miranda* is to mean anything, those subjected to custodial interrogation "cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys" who undertake the task of representing them. *McMann v. Richardson,* 397 U.S. 759, 771; 90 S. Ct. 1441; 25 L.Ed.2d 763 (1970).

The majority opinion states that the Fifth Amendment right to counsel during interrogation encompasses only a constitutional right to "nominal representation" by counsel.[2] What that entails is as unclear as the reasons for counsel's advice and his absence at custodial interrogation here. Counsel apparently fell short of lending his mere corporeal presence to the custodial interrogation room and

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[2] I am at a loss to discern exactly what "nominal representation" would entail. The majority opinion indicates that an attorney could render adequate representation under the circumstances by being merely physically present. I know of no other circumstance where an attorney could fulfill his professional obligation to a client by lending his mere presence to a proceeding. Indeed, it is questionable whether in light of MRCP 1.1, which obligates an attorney to "provide competent representation to a client," this Court could strip the essential incidents of professional, ethical representation to a requirement of a mere physical presence. Moreover, as the United States Supreme Court noted in *Evitts v. Lucey*, 469 U.S. 387; 105 S.Ct. 830; 83 L.Ed.2d 821, 830 (1985), "[N]ominal representation on appeal as of right – like nominal representation at trial – does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all."

instead affirmatively undertook to advise defendant, wrongly, that he should waive his privilege against self-incrimination and talk to the police, because a plea agreement was in the works. There was no agreement, and if the police and the prosecutor are believed, no reasonable basis upon which defense counsel could have assumed that a plea agreement with the prosecutor was in the offing.

Because I believe that defendant's Fifth Amendment right to counsel necessarily entitled him to effective assistance of counsel at custodial interrogation, I would remand this matter to the trial court for a *Ginther*[3] hearing to determine the effectiveness of defendant's attorney in counseling him to waive his rights and speak freely to the police. Further, because defendant's *Miranda* right to counsel had clearly arisen at the time defendant's attorney made his apparent mistakes and, in my estimation, entitled defendant to effective legal representation, I find it unnecessary to address the Sixth Amendment issue the majority has decided.

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[3] *People v. Ginther*, 390 Mich. 436, 443; 212 N.W.2d 922 (1973).

Order

Michigan Supreme Court
Lansing Michigan

July 16, 2007

Clifford W. Taylor,
Chief Justice

Michael F. Cavanagh
Elizabeth A Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

Rehearing, No. 536

3 January 2007

131041

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant/Cross-Appellee

v

CORE RAMONE FRAZIER,
Defendant-Appellee/Cross-Appellant.

SC: 131041
COA: 256986
Genesee
CC: 95-052613-FC

In this cause, a motion for rehearing is considered and it is DENIED.

[SEAL] I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 16, 2007 /s/ Corbin R. Davis
Clerk